Office - Supreme Court, U.S.
FILED
DEC 2 1983
ALEXANDER L. STEVAS,
CLERK

83-914

No. 83-

In The Supreme Court of the United States

OCTOBER TERM, 1983

MERICAN, INC.; MERICAN CURTIS, INC.; AND MERICAN CURTIS, LTD.,

Petitioners,

v.

CATERPILLAR TRACTOR CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROBERT G. LEVY,
BERRYL A. SPEERT,
ALLAN P. HILLMAN,
JOHN M. BELFERMAN,
FRANK, BERNSTEIN, CONAWAY AND GOLDMAN,
1300 Mercantile Bank & Trust Building,
2 Hopkins Plaza,
Baltimore, Maryland 21201,
Telephone: (301) 625-3500.

December 2, 1983

The Daily Record Co., Baltimore, MD 21202

QUESTION PRESENTED

Where the plaintiffs-petitioners ("plaintiffs") were independent competitors, purchasers of millions of dollars worth of electric generator sets in the United States from an authorized dealer of an electrical generator manufacturer and transported them overseas; where plaintiffs competed in the sale and service of such generator sets with certain of the manufacturer's foreign authorized dealers, primarily the dealer in Saudi Arabia, the market for nearly two-thirds of worldwide exports of the manufacturer's sets; where plaintiffs furnished service to the Saudi Arabian government; where, at the behest of certain authorized dealers, primarily the Saudi Arabian dealer, and after giving assurances that steps would be taken to eliminate such competition, the manufacturer and these dealers allegedly conspired to eliminate plaintiffs' competition in the marketing and servicing of the sets, by means of an innovative restraint; where the princi-

pal step taken was modification of a warranty fee system to transform a fee for service into an automatic penalty amounting to 20% of the margin between the wholesale and retail price of the generator sets, imposed upon plaintiffs' supplier when plaintiffs transferred the sets in United States foreign commerce, although plaintiffs, not any authorized dealer, performed the necessary installation and warranty service; and where this penalty was designed to and did make it economically impossible for plaintiffs to continue to compete; are plaintiffs, the target-victims of this alleged conspiracy in violation of Section 1 of the Sherman Act, whose damages are distinct from damages which could have been suffered by their supplier, entitled to recover damages under Section 4 of the Clayton Act, or are they barred by Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) ("Illinois Brick") from recovering such damages?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	13
CONCLUSION	27

APPENDICES

A Opinion of the United States Court of Appeals for the Third Circuit dated July 26, 1983

B Oral Opinion and Order of the United States District Court for the Eastern District of Pennsylvania dated July 2, 1982

C Amended Order of the United States District Court for the Eastern District of Pennsylvania dated August 16, 1982

D Judgment of the United States Court of Appeals for the Third Circuit dated July 26, 1983

E Order of the United States Court of Appeals for the Third Circuit dated September 9, 1983

F Statutes Involved

TABLE OF AUTHORITIES

Cases — Page

Associated General Contractors of California, Inc. v. California State Council of Carpenters, ___ U.S. ___, 103 S.Ct. 897, 74 L.Ed. 723 (1983).....13-14, 23-27

Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982).....13, 16-22, 24-25, 27

Cernuto v. United Cabinet Corporation, 595 F.2d 164 (3d Cir. 1979).....13

Eiberger v. Sony Corporation of America, 459 F.Supp. 1276 (S.D.N.Y. 1978), affirmed as to liability, 622 F.2d 1068 (2d Cir. 1980).....13

Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968).....15

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)....ii, 8, 12-16, 19-20, 22-23, 25, 27

In Re Airport Car Rental Antitrust Litigation, 474 F. Supp. 1072 (C.D. Cal. 1979).....23

Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573 (3d Cir. 1979).....8, 22

Pearl Brewing Co. v. Anheuser-Busch, Inc., 339 F. Supp. 945 (S.D. Tex. 1972).....12

Perma-Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968).....14

Page

Petrol Stops, Northwest v. Continental Oil Co., 1978 Trade Cases ¶62,304 (D. Ariz. 1978).....23

Poller v. CBS, Inc., 368 U.S. 464 (1962).....8

Simpson v. Union Oil Co., 377 U.S. 13, reh. denied, 377 U.S. 949 (1964).....12, 21

Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd., 494 F. Supp. 1246 (E.D. Pa. 1980).....22

Zidell Explorations, Inc. v. Conval International, Ltd., Nos. 82-3511 and 82-3541 (Slip. Op. 9th Cir. November 10, 1983).....13

Other Authorities

"Antitrust Law -- Price Fixing -- Proving Injury Under Section 4 of the Clayton Act," 60 Wash. U.L.Q. 716 (Summer, 1982).....23

Statutes

15 U.S.C. 1 (Section 1 of the Sherman Act).....ii, 13, 16

15 U.S.C. 15 (Section 4 of the Clayton Act).....ii, 14, 18

28 U.S.C. 1254.....2

28 U.S.C. 1292(b).....2

IN THE SUPREME COURT OF THE UNITED STATES

October, Term, 1983

No. 83-

MERICAN, INC.; MERICAN CURTIS, INC.;
and MERICAN CURTIS, LTD.,

Petitioners

v.

CATERPILLAR TRACTOR CO.,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

OPINIONS BELOW

The 2-1 Opinion of the Court of Appeals (Circuit Judge Hunter and District Judge Gerry, with Circuit Judge Higginbotham, dissenting), dated July 26, 1983, is reported in 713 F.2d 958 (3d Cir. 1983) and in 1983-2 Trade Cas. ¶65,511. (App. A to this petition).[1] The unreported

---

[1] References to "App." are references to the appendices to this Petition. References to "3d Cir. App." are references to the Joint Appendix on appeal.

oral Opinion and Order of the United States District Court for the Eastern District of Pennsylvania (VanArtsdalen, J.), dated July 2, 1982, denying defendant-respondent Caterpillar Tractor Co.'s ("Caterpillar's) motion to dismiss or in the alternative for summary judgment, is reproduced as Appendix B hereto.

In an Amended Order dated August 16, 1982 (App. C hereto), the District Court certified a controlling question of law pursuant to 28 U.S.C. 1292(b) which is similar to but less detailed than the "question presented," supra.

JURISDICTION

After the divided Court of Appeals entered Judgment (App. D), a timely petition for rehearing and rehearing in banc was denied on September 9, 1983 by vote of 6-4. (Circuit Judges Gibbons, Higginbotham, Sloviter and Becker would have granted rehearing in banc.) (App. E). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[2]

---

[2]In accordance with Supreme Court Rule 21.1(f), the "statutes involved" herein are set forth in Appendix F. Pursuant to Supreme Court Rule 28.1, plaintiffs state that Merican, Inc. is owned by Scovill Holdings, Inc. Merican Curtis, Inc. is a wholly-owned subsidiary of Merican, Inc. Merican Curtis, Ltd., a foreign corporation, is owned by James C. Hutson-Wiley. Subsidiary and affiliate companies of plaintiffs are: WEMS Manufacturing,

(footnote continued next page)

STATEMENT OF THE CASE

The Plaintiffs

Plaintiffs are two Pennsylvania corporations (one a DISC) and one Liechtenstein corporation. From 1978 through the fall of 1981, plaintiffs purchased over $22.6 million worth of Caterpillar electric generator sets in the United States from Ohio Machinery Co. ("OMCO"), an authorized Caterpillar dealer (their sole supplier for the purpose of this case). Plaintiffs resold the generator sets primarily in the Middle East, largely in Saudi Arabia. (3d Cir. App. 196-200F, 261-64G, 357G).[3] Plaintiffs themselves, or their customers, normally performed the necessary delivery, installation, inspection and warranty service for users of Caterpillar electric generator sets, largely in

---

(footnote continued)
Ltd., Merican Curtis Hong Kong, Ltd., Merican Curtis (UK) Ltd., Merican Curtis SRL, Merican Curtis Financial Services, Merican Curtis Far East, Ltd., Spectest, Ltd., UPE, Inc. and Fleet Power GMC Trucks, Inc.

[3]Saudi Arabia is by far the largest market in the world for the export of Caterpillar electric generator sets; just prior to the 1980 implementation of the non-refundable "penalty" fee at issue, it accounted for approximately 64% of all such exports from the United States. (3d Cir. App. 357G).

competition with authorized Caterpillar dealer Zahid Tractor and Heavy Machinery Company, Ltd. ("Zahid"). (3d Cir. App. 11B, 13-14B, 199-201F, 206-17F). At substantial cost, plaintiff Merican Curtis, Ltd. maintained a facility in Saudi Arabia to enable the performance of such services. (3d Cir. App. 199-201F).[4]

The Restraint

Prior to July, 1978, when an authorized Caterpillar dealer sold a Caterpillar electric generator set into the territory of another authorized Caterpillar dealer, if the dealer into whose territory the set was sold provided warranty service, it made a claim and obtained a fee from the original selling dealer of 5% of the Caterpillar list price. Since authorized Caterpillar dealers normally did not have to provide service on the generator sets sold to plaintiffs (since plaintiffs did so), the need for payment of the additional 5% did not arise

---

[4]When the competition posed by plaintiffs' marketing and servicing was brought to its attention, Caterpillar recognized the substantial competition posed by plaintiffs, and the excellence of plaintiffs' power plant design, engineering, and servicing. (3d Cir. App. 202-07F, 209-16F, 221-22F, 267-75G, 302-06G, 312-15G, 353G). The government of Saudi Arabia also utilized plaintiffs' services. (3d Cir. App. 267-68G).

(3d Cir. App. 205-06F.)

In July, 1978, after plaintiffs and other independent resellers increased their level of competition in the export and servicing of Caterpillar electric generator sets, Caterpillar instituted the predecessor of the program at issue here. It required an authorized dealer which sold a set for initial substantial use outside of its Caterpillar territory to pay the 5% fee to Caterpillar in advance. Caterpillar transferred it to a claiming authorized dealer if such dealer were required to provide warranty service. If no claim was made within one year, the 5% fee was to be returned (without interest). (3d Cir. App. 206F).[5]

Caterpillar conducted a study and concluded in 1979 that plaintiffs posed a major competitive threat (3d Cir. App. 202-07F, 209-16F, 221-22F, 267-75G, 302-06G, 312-15G, 353G), finding plaintiffs had a "good sound reputation in construction and after sale support capability" (3d Cir. App. 271G), "excellent contacts in the Middle East"; engineered most "Cat gen sets into

---

[5]Caterpillar's documents confirm that (whatever its formal articulation of the 1978 fee program) fees from OMCO were exacted in advance (i.e. were not delayed until a claim was filed) because of Caterpillar's characterization in 1979 of plaintiffs as a "reseller" (3d Cir. App. 302G, 306G).

complicated service centers," "service what they sell," and "maintain an inventory of gen sets". Caterpillar concluded "their business approach is a retail sales approach in a manner similar to that used by a Cat dealer" (3d Cir. App. 270G, 306-07G).[6]

In January, 1979, Caterpillar President Robert E. Gilmore conferred in Saudi Arabia with Zahid's President, Talil Zahid. Zahid "expressed his concern over activities of dealers in Saudi Arabia" (App. 276G). Gilmore told Zahid that "measures are being investigated" (3d Cir. App. 276G). Zahid thanked Caterpillar for the visit and for its "interest and concern" (3d Cir. App. 295G).[7]

---

[6]OMCO advised Caterpillar that plaintiffs specialized in the design and engineering of power plants; had repaired equipment sold by various authorized Caterpillar dealers; had redesigned and modified Caterpillar equipment which was improperly designed for certain environments; that they provided financial service and 24-hour field service; and had a trained staff in London, Rome, Philadelphia and Saudi Arabia. OMCO stated that plaintiffs' service had uniformly been accomplished in "a most professional and impressive manner." (3d Cir. App. 267-68G).

[7]Zahid reiterated that it was concerned not only with marketing competition but with increased "parts and service" competition posed by

(footnote continued next page)

Shortly thereafter, Caterpillar's L.E. Wallden telexed Zahid and two other Middle Eastern Caterpillar dealers. Caterpillar requested from the dealers "urgent information" concerning plaintiffs' "inventory, parts inventory, physical facilities, local sponsor and possible sales coverage". In the Wallden telex Caterpillar assured them that "[w]e are doing what we can to slow down their pipeline of Caterpillar equipment." (Emphasis added).

Caterpillar denies that it was involved in a "boycott" of plaintiffs,[8] and the question certified in 1982 for interlocutory appeal did not relate directly to the boycott issue. The Wallden telex indicates that Caterpillar was, in cooperation with its dealers, seeking jointly to effect a boycott -- "doing what we can to slow down their pipeline." It suggests that acts besides the fee system (which was not changed to

---

(footnote continued)
independent marketers, "an alarming trend", which "jeopardized" Zahid's profits. Zahid concluded "we seek your support in steming [sic] this invasion and damaging attack . . . . (3d Cir. App. 296G) (see also 3d Cir. App. 309-11G).

[8]See, e.g., Caterpillar's Reply Brief on appeal (p. 5), in which a section heading recites: "This Case Does Not Involve A Boycott."

the "fee penalty" until the next year) were involved.[9]

In 1979, plaintiffs or their customers continued to provide necessary warranty service, and thus the existing "refundable" 5% fee did not significantly affect plaintiffs' ability to compete. (3d Cir. App. 213-14F, 221-22F, 312-15G, 353G.)[10] Competition by independent marketers grew in 1979 (3d Cir. App. 297G, 357G).

---

[9]The Third Circuit panel majority stated in its Opinion that plaintiffs' "boycott" characterization did not appear to be substantial and that the essence of the claim related only to the fee penalty. The panel criticized the lack of specific "boycott" allegations in plaintiffs' Amended Complaint (App. A, p. 19 n.21), ignoring the fact that it was filed in May, 1981, before any discovery was obtained (3d Cir. App. 22B). Cf. Poller v. CBS, Inc., 368 U.S. 464, 473 (1962) (in antitrust conspiracy cases, "the proof is largely in the hands of the alleged conspirators" and comes to light only through discovery). If a boycott was involved (of which the financial penalty was a part), Illinois Brick would not apply. Mid-West Paper Products, Co. v. Continental Group, Inc., 596 F.2d 573, 585 and 585 n.47 (3d Cir. 1979).

[10]Caterpillar reported in late 1978 that OMCO had "never received a [warranty] claim from the [authorized] Caterpillar dealer where the engines [sold by OMCO to plaintiffs] are used", and OMCO's pricing to [plaintiffs] had therefore "not considered service fee payment [i.e. the 5% refundable fee then in existence] in recent deals" (3d Cir. App. 274G).

Zahid continued to complain concerning the horizontal price and service competition caused by plaintiffs and similar independent marketers (3d Cir. App. 276G, 295-96G, 308-11G, 318-19G). In January, 1980, Caterpillar President Gilmore acknowledged the "increasing competitive strength" Zahid faced, assuring Zahid "[w]e are very much aware of the activities of third parties supplying Caterpillar machines and parts in your territory and continue to work toward solutions within the constraints of U.S. law" (3d Cir. App. 316-17G). Zahid responded that "we particularly appreciate your concern"; that this was "an area of paramount concern;" and that the competition was "causing damage to our pricing structure," resulting in "greatly reducing our already reasonable profit margin." Zahid again requested Caterpillar to do "[a]nything that could be done to alleviate this situation". (3d Cir. App. 319G).

Finally, in February, 1980, Caterpillar instituted the non-refundable fee penalty; Caterpillar now retained the "warranty fee" for itself as "miscellaneous income" even when no authorized dealer made a legitimate fee claim, i.e. when the warranty service was accomplished by others (notably plaintiffs). The fee was a penalty imposed on all sales to plaintiffs, and

was triggered by plaintiffs' transporting of the equipment abroad. (3d Cir. App. 325G, see 3d Cir. App. 322G, 135E).[11]

Zahid thanked President Gilmore for instituting the penalty, which it called "very encouraging", and which Zahid understood was designed "to rectify the problem of encroachment." (3d Cir. App. 351G.) OMCO too understood its implications; though plaintiffs continued to provide excellent service, OMCO recognized its pricing to plaintiffs would necessarily change (3d Cir. App. 352- 53G).[12]

Plaintiffs had built a substantial business and goodwill in the marketing and servicing of Caterpillar electric generator sets and attempted to continue to market and service them for business reasons, in spite of the lack of

---

[11]This non-refundable fee was retroactive; unclaimed fees paid in advance prior to the end of February, 1980, i.e. under the 1978-79 program, were not to be refunded, under any circumstances. (3d Cir. App. 353G.) In the Third Circuit panel Opinion, there is a typographical error. At page 4, ¶4, "1978" should be "1980." (App. A, p. 4).

[12]OMCO reiterated that, as a result of plaintiffs' marketing, "a void has been filled and Caterpillar product supplied in place of competitive product. In almost every opportunity, the local Cat dealer has not been the customer's alternative." (3d Cir. App. 353G.).

any significant profit on the sales in the wake of the fee penalty (3d Cir. App. 264-65G). By the fall of 1981, however, plaintiffs were required for economic reasons to transfer their Caterpillar electric generator set business in Saudi Arabia to OMCO, and ceased marketing Caterpillar electric generator sets in the Middle East and elsewhere (3d Cir. App. 261G, 265-66G; see 3d Cir. App. 223-225F).[13]

Only the institution of the 5% non-refundable fee (equivalent to 20% of the margin between the wholesale and retail price) insured

---

[13]Plaintiffs continued to market and service the sets until then for several reasons. They realized a cash flow advantage, owing to the time of receipt of funds from a sale and the time of payment by plaintiffs to their supplier. Plaintiffs' principal customer, Rabiah & Nassar Co. ("Ranco"), dealt in other products with plaintiffs' group, and plaintiffs desired to maintain the relationship with Ranco. Ranco had built its reputation with respect to generator sets as a marketer of Caterpillar sets; plaintiffs were geared up to support and were concentrating upon such marketing; and it was not the type of business which was feasible to terminate quickly. Moreover, reduction of a large percentage of sales would be viewed negatively in evaluation of plaintiffs by financial institutions. Finally, plaintiffs had filed suit by September, 1980, and hoped that the result of the litigation would be to eliminate the fee penalty. (3d Cir. App. 265-65G).

that, regardless of the service provided by plaintiffs, sales to plaintiffs would be subject to a large penalty, and plaintiffs' ability to profit and ultimately to compete would be eliminated. The innovative scheme targeted the competition generated by plaintiffs and by other independent competitors; in plaintiffs' case, it was as effective as an overt boycott, which, as the Wallden telex suggests, may also have existed.[14]

---

[14] This Court cautioned in Simpson v. Union Oil Co., 377 U.S. 13, 24, reh. denied, 377 U.S. 949 (1964) that "legality for antitrust purposes" may neither "turn on clever draftsmanship," nor upon "easy manipulation." As Judge Bue observed in Pearl Brewing Co. v. Anheuser-Busch, Inc., 339 F. Supp. 945, 952 (S.D. Tex. 1972): "At the time the Sherman Act was enacted its drafters obviously could not foresee the many sophisticated business and economic arrangements in American industry that have emerged in recent years, nor could they anticipate the multiple varieties of innovative devices that have been conjured up by inventive businessmen in an effort to circumvent section 1 of the Act."

It is not unlikely that, in 1980, Caterpillar recognized that Illinois Brick could be used in an attempt to immunize it from any liability, since its dealers would be most unlikely to jeopardize their huge investments by suing it, and since it might be able to argue in Court that everyone else was an "indirect purchaser" barred by Illinois Brick.

The institution of a vertical restraint as a result of horizontal pressure to prevent price competition constitutes a per se violation of Section 1 of the Sherman Act. Zidell Explorations, Inc. v. Conval International, Ltd., Nos. 82-3511 and 82-3541 (Slip. Op. 9th Cir. November 10, 1983); Cernuto v. United Cabinet Corporation, 595 F.2d 164 (3rd Cir. 1979). A similar, though more benign "warranty fee" sham was struck down in Eiberger v. Sony Corporation, 459 F.Supp. 1276 (S.D.N.Y.) (per se and rule of reason violation), affirmed as to liability, 622 F.2d 1068 (2nd Cir. 1980) (rule of reason violation; court held it was not required to reach per se issue).

REASONS FOR GRANTING THE WRIT

This case presents questions concerning the applicability of Illinois Brick to a factual situation considerably different from the horizontal price-fixing conspiracy presented in Illinois Brick. The division in the Third Circuit reflects its uncertainty in defining the parameters of the Illinois Brick rule, especially in light of this Court's holding in Blue Shield of Virginia v. McCready, 457 U.S. 462 (1982), recognizing that antitrust damage recoveries may not be limited to only one injured party, and in Associated General Contractors of

California v. California State Board of Carpenters, _____ U.S. _____ 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983), recognizing the relevance, for the purpose of the right to recover damages, of plaintiffs' status as the target of the conspiracy. The Third Circuit panel Opinion threatens the efficacy of private antitrust enforcement, which is particularly favored by this Court, Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968); it unintentionally provides means by which, employing clever draftsmanship, a party may violate the antitrust laws yet avoid liability by structuring an anticompetitive scheme to include an "Illinois Brick" overcharge element. Under Rule 17(c) of this Court, certiorari should be granted to review these important questions of antitrust law.

The Court of Appeals' Decision Misapplied Illinois Brick

In Illinois Brick, Illinois sued manufacturers of concrete block seeking damages under Section 4 of the Clayton Act. Plaintiff, an "indirect purchaser," alleged that defendants had conspired horizontally to fix the manufacturers' prices.

This Court ruled that Illinois could only prove antitrust injury by proving that an overcharge was passed on to it by a direct purchaser, and it was therefore barred from recovery. 431 U.S. at 727. It ruled that the "passing on" defense prohibited by Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968), should apply equally, and thus barred "offensive" use of a pass-on by a plaintiff. It sought to avoid duplicative recovery of the same damages from a defendant, and undue complexity of damage analysis where such complexity would frustrate rather than encourage private antitrust suits. 431 U.S. at 730-33, 737. The overriding goal of Illinois Brick was to further the "long-standing policy of encouraging private enforcement of the antitrust laws," 431 U.S. at 745, in order that (a) a defendant would not retain the fruits of its illegal conduct and (b) victims of antitrust violations would be compensated for their injuries. 431 U.S. at 746.

Unlike the normal Illinois Brick horizontal price-fixing case, in which the conspirators are not concerned with which level of purchasers are harmed, but merely seek to obtain an enhanced price, in the present case, the very object of the conspiracy was to eliminate sales

and service competition by marketers such as plaintiffs, under the guise of "insuring" the provision of the very warranty service which plaintiffs themselves furnished.

In dissenting in this case, Judge Higginbotham recognized, as had the District Court (VanArtsdalen, J.), that the enforcement and compensation concerns which are central to Illinois Brick (as reaffirmed in Blue Shield, infra,) were best served by enabling plaintiffs to assert their damage claim under Section 1, and that Illinois Brick should not be expanded beyond its confines to any conceivable factual situation which an ingenious party might devise. Thus, even assuming that plaintiffs' supplier OMCO could sue for "overcharge" damages (a remote possibility, see infra), the dissent recognized that prosecution of this suit would be both "consistent with Illinois Brick and necessary to avoid immunizing the anti-competitive tactic" alleged. (App. A. p. 23). The dissent stated:

> ****[P]laintiffs alleged loss of sales and profits, reduction in the value of goodwill, and destruction of a significant portion of their businesses . . . . Many of these alleged injuries are unique to the plaintiffs, and their complaint comprises more damage than the intermediary Ohio Ma-

> chinery Company could recover were it to bring its own action. By putting treble damages outside of plaintiffs' reach, the majority effectively places complete recovery outside of anyone's reach. Under the majority's approach, plaintiffs cannot be made whole -- notwithstanding the impossibility of duplicative recovery -- and defendants cannot be made to give up the fruits of an alleged illegality.**** Likewise, allowing the instant suit to go forward is necessary to the attainment of the goal of deterrence. . . . This is not a case where passed-on overcharges are so splintered that no indirect purchaser would be interested in pursuing relief; here plaintiffs allege predatory destruction of their business -- a complaint which only they may bring. (App. A, pp. 23, 26-27).

The Court of Appeals Decision
Cannot Be Reconciled With Blue Shield

In Blue Shield, the plaintiff, a consumer of medical services, sought treble damages for injury resulting from an alleged conspiracy to boycott and exclude psychologists from receiving compensation under a health plan, thereby reducing their ability to compete effectively with psychiatrists whose services were covered by the plan. (The services of a psychologist were covered only when such services were billed

through a physician). Plaintiff sought recovery of the costs which she incurred as a customer of psychologists' services, for which she had paid, but for which she was not reimbursed by the plan.

This Court held that the right to sue under Section 4 of the Clayton Act was "expansive"; that it had "refused to engraft artificial limitations on the Section 4 remedy," 457 U.S. at 472; and that the Court would not "add requirements to burden a private litigant beyond what is specifically set forth by Congress...." 457 U.S. at 472 n.9. It held that more than one person or class of persons damaged by an antitrust violation may sue for damages, recognizing that the Section 4 remedy "cannot reasonably be restricted to those competitors whom the conspirators hoped to eliminate from the market." 457 U.S. at 479.[15]

In reaching its conclusions, this Court in Blue Shield looked:

> (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and (2) more particularly, to the relationship of the injury alleged

---

[15] By contrast, unlike McCready, plaintiffs in the present case were the "competitors whom the conspirators hoped to eliminate from the market."

> with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under §4.

457 U.S. at 478.

This Court held that McCready could sue for damages since, although she was not the "target," her injury was "clearly foreseeable", "was a necessary step in effecting the ends of the alleged illegal conspiracy", 457 U.S. at 479, was "intertwined" with that suffered by the boycotted psychologists, 457 U.S. at 484, and because she was "within that area of the economy . . . endangered by [the] breakdown of competitive conditions" 457 U.S. at 480-81. Injury to plaintiffs in the present case was the end sought by the illegal conspiracy.

In Blue Shield this Court explained that the rule of Illinois Brick is to be applied narrowly, focusing on its avoidance of "duplicative recovery" of a single overcharge. 457 U.S. at 474. This Court held that "if [Illinois Brick had] a subordinate theme" it may be that "in certain limited circumstances" the fact that damages can only be proven by a plaintiff by use of "massive evidence and complicated theories" could be relevant, but the avoidance of extreme

difficulties of damage proof is only appropriate when to accept such proof would be "to discourage vigorous enforcement of the antitrust laws by private suits." 457 U.S. at 475 n.11. See, Merican Inc. et al. v. Caterpillar, App. A. pp. 26-27 (Higginbotham, J., dissenting).

This Court's Opinion rejects the view stated by Justice Rehnquist in dissent that Illinois Brick must bar recovery by either McCready or by the psychologists. 457 U.S. at 492 n.8. The dissent recognized the parameters of the Blue Shield holding. 457 U.S. at 491. Similarly, in the present case, the District Court rejected defense counsel's suggestion that Blue Shield was merely a restatement of general principles with respect, inter alia, to Illinois Brick, stating: "If that is all that Blue Shield stands for then it would seem to me rather odd that the Supreme Court would even have accepted certiorari in the case . . . ." (3d Cir. App. 412I.) The District Court held that it is "clear" from Blue Shield that, contrary to the "very wide or broad interpretation" by some lower courts (App. B. p.2), "it is improper to just mechanically apply the Illinois Brick doctrine and thereby exclude in every case anybody who is not a direct purchaser . . . ." (App. B.

p. 2). Refusing to exalt form over substance, see Simpson v. Union Oil Co., supra, the District Court held:

> It is true that in carrying out [the] conspiracy in effect it was aimed in such a way that prices that the plaintiff[s] would have to pay for the products were increased, but as I understand it, the injury is not the increased price itself, but simply that the increased price is what brought about injury such as forcing plaintiffs out of business and lost profits.
>
> It would seem to me that the antitrust laws are, among other things, very definitely for the purpose of protecting businesses from being the target of a conspiracy to drive them out of business. (App. B, pp. 2-4) (emphasis added).

See, Blue Shield, 457 U.S. at 478.[16].

---

[16]It is noteworthy also that in a February 22, 1982 affidavit submitted to Caterpillar's counsel by President Thomas Taylor of OMCO (3d Cir. App. 110E), he states that OMCO did not suffer any damage as a result of the fee penalty or its predecessor program:

> Neither the existence of the 5% ISF [warranty fee] nor any changes in Caterpillar's administration thereof, including the 1978 or 1980 changes, has had any apparent effect on Ohio Machinery's incentive

(footnote continued next page)

In addition to relying upon this Court's opinion in Blue Shield, the District Court and the panel dissent relied upon the Third Circuit's interpretation of Illinois Brick in Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573 (3d Cir. 1979), in which the Court limited Illinois Brick to above-market horizontal price-fixing cases and held that vertical restrictions and boycotts were not within the Illinois Brick rule. 596 F.2d at 585 and 585 n.47.[17]

(footnote continued)

> or ability to sell Caterpillar electric generator sets outside its service territory generally or in Saudi Arabia specifically (emphasis added).

The OMCO affidavit makes clear, at a minimum, how infinitesimal is the chance that OMCO could sue Caterpillar successfully for any damages resulting from the transactions involving plaintiffs. Plaintiffs are moving in the District Court to amend their Complaint to allege also a common law tort, which motion Caterpillar is expected to oppose, but this has no relevance to the substantial antitrust damage question presented here.

[17] The District Court stated that Mid-West "foreshadowed" Blue Shield. (App. B. p. 3). Similarly, in Zenith Radio Corp. v. Matsushita Electric Industrial Co. Ltd., 494 F. Supp. 1246, 1255-56 (E.D. Pa. 1980), the Court declined de-

(footnote continued next page)

The Court of Appeals' Decision Cannot Be Reconciled with Associated General Contractors

The panel majority also failed to heed the teaching of this Court in Associated General Contractors, which denied standing to a union where "the union was neither a consumer nor a competitor in the market in which trade was restrained", and where it was "not clear whether the union's interests would be served or disserved by enhanced competition in the market." Id. at 909. This Court recognized that "[t]he most specific allegations relate to the labor relations between the parties. . . . and therefore involve matters that are not subject to review under the antitrust laws." Id. at 900, 902. The union's damages were several times removed from the acts causing damage, Id. at 904; see

---

(footnote continued)
fendants' suggestions to "read [Illinois Brick] broadly", and held that "the cases which have construed Illinois Brick have, for the most part, refused to extend it beyond its confines." 494 F. Supp. at 1255. See, In Re Airport Car Rental Antitrust Litigation, 474 F. Supp. 1072, 1107-09 (C.D. Cal. 1979); Petrol Stops, Northwest v. Continental Oil Co., 1978 Trad. Cas. ¶62,304 at p. 75,885 (D. Ariz. 1978); "Antitrust Law-Price Fixing - Proving Injury under Section 4 of the Clayton Act . . .", 60 Wash. U.L.Q. 716, 723 (Summer, 1982).

Id. at 909-10 and 909 n.46; and the union's claim rested upon "nothing but speculation." Id. at 911.

This Court concluded that "the union's allegations of consequential harm resulting from a violation of the antitrust laws, although buttressed by an allegation of intent to harm the union" were an insufficient basis upon which to grant it standing given the other circumstances of the case described above. Id. at 913. However, while the union's claimed status as "target" was not, alone, sufficient to confer upon it a right to sue for damages, the Court did not hold, as Caterpillar may argue, that a party's status as a "target" can never be significant in determining whether it may recover antitrust damages. It may not be of "controlling" importance, 103 S. Ct. at 908 n. 37, but it is relevant. Indeed, Blue Shield and Associated General Contractors both emphasize the importance of the "nexus" between the violation and the harm to plaintiff.

Associated General Contractors holds that, while a plaintiff's status as alleged "target" of a violation is not a "panacea" to enable every complaint to withstand a motion to dismiss, yet in an appropriate case "an allegation of improper motive [toward plaintiff] . . . may sup-

port a plaintiff's damages claim under Section 4." Id. at 908; see Id. at 908 n.35[18]

The significance of the Third Circuit panel's failure to consider the relevance of plaintiffs' status as targets, and to consider all of the factors discussed in Associated General Contractors and Blue Shield, rather than mechanically misapplying Illinois Brick, is apparent from Associated General Contractors' discussion of recovery of damages by a target which is indirectly "hit." This Court held that, in 1890, Congress anticipated that "well accepted common law rules" would govern antitrust damage litigation, 103 S. Ct. 906, and that, while the general common law tort rule provides that a plaintiff's injury caused by defendant's conduct with respect to a third party is often too remote to sustain a recovery, a plaintiff may recover damages if defendant's act directed at a third party is a "willful" act, the "purpose" of which is to harm the plaintiff. In other words, a plaintiff which is indirectly injured may not

---

[18]This Court also cited authority which held that the "specific intent" of defendant is "ordinarily" sufficient to confer standing, particularly, but not limited to cases involving an effort to boycott plaintiffs, i.e. an effort, as here, jointly to eliminate plaintiffs' competition from the market. Id. at 908 n. 35.

recover damages "unless the wrongful act is willful for that purpose" 103 S. Ct. at 906, n. 25 (citing J. Sutherland, A Treatise on the Law of Damages.) (Emphasis added). In the present case it is alleged, and the evidence confirms that Caterpillar's conduct (imposition of the non-refundable fee) toward the "third party" (OMCO) was aimed at injuring the target's (plaintiffs') ability to compete. In other words, "the wrongful act [was] willful for that purpose," 103 S. Ct. at 906 n.25, and plaintiffs have the right to sue for and recover antitrust damages.

This Court held in summary:

> [T]he infinite variety of claims that may arise make it virtually impossible to announce a blackletter rule that will dictate the result in every case.**** [Our] prior cases have emphasized the central interest in protecting the economic freedom of participants in the relevant market. Last term in Blue Shield of Virginia v. McCready, supra, we identified the relevance of this central policy to a determination of the plaintiff's right to maintain an action under §4.

103 S. Ct. at 908-09 (footnotes omitted). As the District Court recognized (App. B. p. 4) plaintiffs' injury caused by a conspiracy to drive them out of business "was of a type that

Congress sought to redress in providing a private remedy for violations of the antitrust laws," Blue Shield, 457 U.S. at 483; Accord, Associated General Contractors, 103 S. Ct. at 909.

It is evident that a substantial divergence of view exists concerning the appropriate application of this Court's pronouncements in Illinois Brick, Blue Shield and Associated General Contractors. District Judge VanArtsdalen and Circuit Judge Higginbotham interpreted the decisions of this Court to permit assertion of plaintiffs' damage claim; Circuit Judge Hunter and District Judge Gerry (sitting with the panel) took a different view. The full Court of Appeals split 6-4 in ruling upon plaintiffs' motion for rehearing in banc. Clarification from this Court is required in order to permit the proper implementation of this Court's decisions.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Date: December 2, 1983

Respectfully submitted,

Robert G. Levy
Berryl A. Speert
Allan P. Hillman
John M. Belferman
Frank, Bernstein, Conaway
& Goldman

1300 Mercantile Bank &
Trust Building
2 Hopkins Plaza
Baltimore, Maryland 21201
(301) 625-3500

Attorneys for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1577

MERICAN, INC. and MERICAN CURTIS, INC.
and MERICAN CURTIS, LTD.

v.

CATERPILLAR TRACTOR CO.

Caterpillar Tractor Co., Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

D.C. Civil No. 80-3723

Argued April 12, 1983

Before: HUNTER, HIGGINBOTHAM, *Circuit Judges* and GERRY,* *District Judge*

(Opinion filed July 26, 1983)

John DeQ. Briggs, III (Argued)
David C. Murchison
William E. Wallace, III
Albert C. Loebe
Howrey & Simon
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Attorneys for Appellant

---

*Honorable John F. Gerry, United States District Judge for the District of New Jersey, sitting by designation.

Robert G. Levy (Argued)
Berryl A. Speert
Allan P. Hillman
John M. Belferman
Frank, Bernstein, Conaway
& Goldman
1300 Mercantile Bank Bldg.
2 Hopkins Plaza
Baltimore, MD 21201
Attorneys for Appellees

OPINION OF THE COURT

HUNTER, *Circuit Judge*:

1. This interlocutory appeal requires us to address the limits imposed by *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), on liability for treble damages under section 4 of the Clayton Act, 15 U.S.C.A. §15 (West Supp. 1983). The issue arises in an action filed by plaintiff-appellees Merican, Inc., Merican Curtis, Inc., and Merican Curtis, Ltd. ("Appellees") against defendant-appellant Caterpillar Tractor Company ("Caterpillar"). Appellees allege that Caterpillar violated section 1 of the Sherman Act, 15 U.S.C. §1 (1976), by illegally imposing a penalty on its dealers in order to eliminate the source of supply of Caterpillar products to Appellees and other independent marketers. Following the district court's denial of Caterpillar's motion to dismiss, we granted appellate review under 28 U.S.C. §1292(b) (1976) to address the question of whether Appellees are precluded from maintaining a private damage action by operation of the rule of *Illinois Brick*. We hold that the district court misconstrued the scope of *Illinois Brick* and its progeny and that it erred by refusing to grant Caterpillar's motion to dismiss Appellees' claims for damages.

2. This case involves the international sale and distribution of electric generator sets designed, manufactured, and marketed by Caterpillar.[1] To distribute its generator sets Caterpillar employs a world-wide network of authorized Caterpillar dealers who function generally as retail sellers of Caterpillar products. Each of those dealers enters into a Distribution Agreement with Caterpillar which provides for, *inter alia*, the promotion, distribution, installation, and servicing of Caterpillar-manufactured products by the dealers. Under that agreement each dealer has an area of service responsibility in which he agrees to maintain one or more suitable places of business, to maintain adequate service facilities, to employ trained salesmen to market Caterpillar's products, and to employ trained technicians and mechanics to render diagnostic and mechanical service to all users of Caterpillar products in the dealer's service area. In addition each dealer agrees to provide, free of charge to the user, delivery, inspection, and warranty services with respect to all Caterpillar products that receive their "initial substantial use" in that dealer's service territory, regardless of when, where, or by whom the product may have been sold.

3. Under the Distribution Agreement in effect in 1978, Caterpillar agreed to sell new generator sets to its dealers at a discount of 25% off the list price. Caterpillar allocated 5% of that discount as reasonable compensa-

---

1. An electric generator set typically consists of a diesel engine, a generator, a battery, a governor, and transfer switches. It is used to provide "prime" power to buildings and clusters of buildings without access to central power sources and to provide "standby" power to hospitals, schools, or other buildings. Caterpillar has sold a number of generator sets outside of the United States, specifically in the Middle East, for use in areas isolated from central sources of electrical power.

tion for the dealer's obligation to assume the responsibility of providing delivery, inspection, and warranty services described above. If a dealer sold a generator set that received its initial substantial use in a second dealer's service territory, the selling dealer was not entitled to the 5% "service fee" and thus was only entitled to keep a 20% discount. Under the Distribution Agreement the selling dealer was required to return the 5% to Caterpillar, which in turn transferred it to the dealer responsible for providing service, if that dealer filed an appropriate claim. Caterpillar had a practice of returning the service fee to the selling dealer if the servicing dealer did not claim the fee within one year.[2] Thus if a selling dealer sold a generator set for use outside his territory to an independent marketer who provided full warranty service, the selling dealer could adjust his price down knowing that another Caterpillar-authorized dealer would not have to provide service and accordingly would not claim the fee.

4. In 1978 Caterpillar instituted a new system for collecting the 5% service fee from its dealers. Under the new system Caterpillar no longer returned the service fee to a selling dealer when the servicing dealer made no claim for the fee. Instead the company retained all unclaimed service fees as miscellaneous income. The practical result of Caterpillar's new system was that its dealers could not provide as large a price reduction off the list price when they sold a generator set to an independent marketer for resale outside of the selling dealer's service area.

---

2. Prior to 1978 many dealers who sold generator sets receiving their initial substantial use in another dealer's service territory would simply transfer the 5% service fee directly to the servicing dealers. In July of 1978, Caterpillar began insisting that its dealers strictly comply with the terms of the Distribution Agreement. Thus, as soon as a dealer knew that a generator set it was selling would receive its initial substantial use in another dealer's territory, he had to remit the 5% to Caterpillar, even if the servicing dealer had not yet claimed the fee.

5. Appellees are general trading companies engaged in the international marketing and servicing of numerous products. In the mid-1970's Appellees began to trade in Caterpillar electric generator sets by purchasing them in the United States and then reselling them in the international market. Appellees purchased the sets primarily from Ohio Machinery Company ("OMCO"), a Caterpillar-authorized dealer located in Cleveland, Ohio. They would then resell them in competition with Caterpillar-authorized dealers in Europe and the Middle East, specifically Zahid Tractor and Heavy Machinery Company ("Zahid"), Caterpillar's authorized dealer in Saudi Arabia. Appellees or their reseller-customers performed the necessary delivery, installation, inspection, and warranty service for the users of the generator sets.

6. Appellees allege that Caterpillar changed its fee system in 1980 because of Appellees' competition in selling generator sets in Saudi Arabia. Appellees claim that the new system was the result of a combination and conspiracy between Caterpillar and Zahid "to allocate customers and territories for the sale of Caterpillar electric generator sets and to foreclose [Appellees] and other generator set marketers from engaging in price competition with defendant's authorized dealers." Complaint ¶21, app. at 18B.[3] Appellees allege that the service fee in effect became an "automatic penalty" imposed on dealers who sold generator sets for use outside their territory. They claim that because of Caterpillar's new policy, they have suffered substantial losses in sales and profits and have been restrained from securing new business. Appellees also allege that prices of electric generator sets have been artifically stabilized and maintained, that competition in the sale of the generator sets has been substantially lessened or eliminated, that Caterpillar's

---

3. Appellees allege that other unnamed corporations, firms, and individuals also participated as co-conspirators. Complaint at ¶9, app. at 9B.

authorized dealers have been prevented from distributing generator sets in territories and to customers of their choosing, and that purchasers of the generator sets have been deprived of the opportunity to purchase those products from suppliers of their own choice at competitive prices.

B

7. On September 25, 1980, Appellees filed this action in the United States District Court for the Eastern District of Pennsylvania. They filed an amended complaint on May 26, 1981. In their amended complaint Appellees claimed that Caterpillar's service fee system violated section 1 of the Sherman Act, 15 U.S.C. §1 (1976).[4] Appellees sought monetary and injunctive relief under sections 4 and 16 of the Clayton Act, 15 U.S.C.A. §15 (West Supp. 1983); 15 U.S.C. §26 (1976 & Supp. II 1978).

8. On March 1, 1982, Caterpillar filed a motion to dismiss[5] based on the rule of *Illinois Brick* that "indirect purchasers" are precluded from suing for passed-on damages under section 4 of the Clayton Act. *See Illinois Brick*, 431 U.S. at 746.[6] After hearing argument the dis-

---

4. Section 1 of the Sherman Act states in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

15 U.S.C. §1 (1976).

5. In the same motion Caterpillar also sought summary judgment claiming that the district court was without jurisdiction to hear Appellees' claims. The district court denied that part of Caterpillar's motion holding that it had jurisdiction over Appellees' claims. App. at 452I-53I. We see no reason to disturb the district court's holding on that issue.

6. In its motion Caterpillar conceded that the rule of *Illinois Brick* would not bar Appellees from seeking injunctive relief under §16 of the Clayton Act, 15 U.S.C. §26 (1976). App. at 102D; *see Mid-West Paper Prods. Co. v. Continental Group, Inc.*, 596 F.2d 573, 589-94 (3d Cir. 1979).

trict court issued an order from the bench on July 2, 1982, denying Caterpillar's motion. While recognizing Appellees' status as indirect purchasers, the district court held that based on the then-recent opinion of *Blue Shield of Virginia v. McCready*, 102 S. Ct. 2540 (1982), it was improper "to just mechanically apply the *Illinois Brick* doctrine and thereby exclude in every case anybody who is not a direct purchaser from the original seller or the manufacturer." App. at 451I. Because the Appellees had alleged that they were the "direct target[s] of an unlawful conspiracy," the district court held that under *Illinois Brick*, as interpreted by *Blue Shield*, Appellees could maintain their action for damages. App. at 452I-53I. On August 16, 1982, the district court entered an amended order denying Caterpillar's motion to dismiss and certifying a controlling question of law for immediate appeal pursuant to 28 U.S.C. §1292(b) (1976).[7]

---

7. The question certified by the district court reads:

> When an alleged conspiracy between an electrical generator manufacturer and one of its authorized foreign dealers is formed to hinder and/or exclude intra-brand competition in the foreign market by an independent, non-factory authorized dealer who purchases from other authorized dealers for resale in the foreign market, whereby the manufacturer imposes a non-refundable "5% warranty service fee" on all sales by authorized dealers when the generators are to be installed for initial use outside of the authorized selling dealer's assigned geographical service territory, is the "target-victim" of the conspiracy (the independent non-factory authorized dealer) precluded from maintaining a private damage action against the manufacturer under Section 4 of the Clayton Act (15 U.S.C. §15) by operation of the rule of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977)?

App. at 457J-58J.

On a §1292(b) appeal we consider all grounds which might require a reversal of the order appealed from. *Murphy v. Heppenstall Co.*, 635 F.2d 233, 235 n.1 (3d Cir. 1980), *cert. denied*, 454 U.S. 1142 (1982); *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 754 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 885 (1974); *Johnson v. Alldredge*, 488 F.2d 820, 822-23 (3d Cir. 1973), *cert. denied*, 419 U.S. 882 (1974); *see* C. Wright & A. Miller, *Federal Practice and Procedure* §3931 (1977 & Supp. 1983).

We granted Caterpillar's petition for permission to file an interlocutory appeal on September 20, 1982.

II

9. Section 4 of the Clayton Act provides a treble damage remedy to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C.A. §15 (West Supp. 1983). On its face section 4 is written very broadly. If read literally it is expansive enough to encompass any injury that could be attributed directly or indirectly to the consequences of an antitrust violation. The Supreme Court has held, however, "that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 103 S. Ct. 897, 907 (1983) (quoting *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 263 n.14 (1972)). Rather section 4 claims must be considered in light of the statutory purposes behind the awarding of treble damages: to deter antitrust violators and deprive them of "the fruits of their illegality," and to compensate victims of antitrust violations for their injuries. *Pfizer Inc. v. Government of India*, 434 U.S. 308, 314 (1978). In light of those statutory policies, the Supreme Court has recognized two types of limitations on the availability of the section 4 remedy which courts must consider when examining whether a treble damage action may be maintained. *Blue Shield of Virginia v. McCready*, 102 S. Ct. 2540, 2545-46 (1982); *see In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 691 F.2d 1335, 1340 n.6 (9th Cir. 1982).

10. The first limitation on section 4 damage actions is drawn from *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). *Blue Shield*, 102 S. Ct. at 2546. In *Hawaii v.*

Standard Oil the Supreme Court held that section 4 did not authorize a state to sue in its *parens patriae* capacity for damages to its "general economy." 405 U.S. at 264.[8] In *Illinois Brick* the Court held that indirect purchasers in a chain of distribution were precluded from bringing a damage action based on overcharges passed on to them by the direct purchasers of an antitrust violator. 431 U.S. at 746.[9] Those cases recognize that there are certain

---

8. *Hawaii v. Standard Oil* was a suit by the State of Hawaii against several producers of petroleum. Hawaii alleged that the producers had entered illegal contracts, conspired to restrain trade, and attempted to monopolize the market. It sought damages in its proprietary capacity for overcharges to the State itself, as *parens patriae* for overcharges to the State's citizens, and as a class representative for all overcharged purchasers in Hawaii. 405 U.S. at 253. The Court held that the injury asserted by Hawaii in its *parens patriae* capacity was not an injury to its "business or property" under §4. 405 U.S. at 264.

9. *Illinois Brick* was an action brought by the State of Illinois against manufacturers and distributors of concrete block in the Greater Chicago area. The concrete block manufacturers sold the blocks to masonary contractors who used them to build masonary structures; those structures were incorporated into entire buildings by general contractors, and the buildings were then sold to the State. The State claimed that the concrete block manufacturers had engaged in a combination and conspiracy to fix the prices of concrete block in violation of §1 of the Sherman Act, 15 U.S.C. §1 (1976). *Illinois Brick*, 431 U.S. at 726-27. The Court held that the State, as an indirect purchaser of the concrete block, was not an "injured person" under §4. *Id.* at 746.

The Court's opinion in *Illinois Brick* was "logically compelled" by its earlier decision in *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968). *Mid-West Paper Prods. Co. v. Continental Group, Inc.*, 596 F.2d 573, 576 (3d Cir. 1979). In *Hanover Shoe* the Court held as a matter of law that an antitrust violator generally could not interpose a defense that a direct purchaser has not been injured because it had passed on an illegal overcharge to its own customers. 392 U.S. 494. *Illinois Brick* involved the offensive use of a pass-on theory by an indirect purchaser against an antitrust violator. Refusing to cut back on its holding in *Hanover Shoe*, the Court held that symmetry required barring the offensive use of

classes of plaintiffs who, although able to trace an injury to an antitrust violation, are generally not within the group of "private attorneys general" Congress created to enforce the antitrust laws under section 4. *Illinois Brick*, 431 U.S. at 746; *Hawaii v. Standard Oil*, 405 U.S. at 262; *see Blue Shield*, 102 S. Ct. 2545-46. The Court in both *Hawaii v. Standard Oil* and *Illinois Brick* relied on two distinct policies to conclude that a section 4 claim was unavailable. First, it "focused on the risk of duplicative recovery engendered by allowing every person along a chain of distribution to claim damages arising from a single transaction that violated the antitrust laws." *Blue Shield*, 102 S. Ct. at 2546. Second, it sought "to avoid burdening §4 actions with damages issues giving rise to the need for 'massive evidence and complicated theories,' where the consequences would be to discourage vigorous enforcement of the antitrust laws by private suits." *Id.* at n.11.[10] Applying those policies the Court concluded that it was inconsistent with the broader remedial purposes of the antitrust laws to allow the plaintiffs in either case to maintain a treble damage action.

11. The second limitation on section 4 damage actions identified by the Court is analytically distinct from the issue of what class of persons can sue for treble dam-

---

NOTE — *(Continued)*
pass-on by indirect purchasers in the distribution chain. *Id.* at 736; *see Mid-West Paper Products*, 596 F.2d at 576-77.

In *Blue Shield of Virginia v. McCready*, 102 U.S. 2540 (1982), the Court recently reaffirmed the analysis in *Illinois Brick*. *Blue Shield* involved a suit by a Blue Shield subscriber who alleged that Blue Shield's policy of reimbursing subscribers for psychotherapy provided by psychiatrists, but not by psychologists, violated §1 of the Sherman Act. The Court discussed the policies underlying *Illinois Brick* and held that, on the facts presented, the plaintiff was not barred from suit by operation of the *Illinois Brick* rule. 102 S. Ct. at 2546.

10. The Court in *Blue Shield* denoted the problem of disentangling complex damage theories as a "subordinate theme." 102 S. Ct. at 2546 n.11.

ages. It "is the conceptually more difficult question 'of which persons have sustained injuries *too remote* [from an antitrust violation] to give them standing to sue for damages under §4.'" *Blue Shield*, 102 S. Ct. at 2547 (emphasis in original) (quoting *Illinois Brick*, 431 U.S. at 728 n.7). Through this concept of "antitrust standing," *see Associated General Contractors*, 103 S. Ct. at 907 n.31,[11] the Court has engrafted on section 4 an analysis akin to "proximate cause" to determine whether a particular injury is too far removed from an alleged violation to warrant a section 4 remedy.[12] Because of the infi-

11. Included within the general perimeter of antitrust standing appears to be the idea of "antitrust injury" articulated by Justice Marshall in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). *See Associated Gen. Contractors*, 103 S. Ct. at 908-09; *Blue Shield*, 102 S. Ct. at 2550-51. *See generally* Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. Chi. L. Rev. 467 (1980).

12. The courts of appeals have formulated a number of tests as aids in determining whether an injured party has sufficient standing under the antitrust laws to recover under §4. Some courts focus on the "directness" of the injury, *e.g.*, *Productive Inventions, Inc. v. Trico Prods. Corp.*, 224 F.2d 678 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956); *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963); on its "foreseeability," *e.g.*, *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974); *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964); whether the injury "is arguably within the zone of interest protected by the antitrust laws," *e.g.*, *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142, 1152 (6th Cir. 1975); or whether the injured party was within the "target area" of the alleged antitrust conspiracy, *e.g.*, *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539 (5th Cir. 1980), *cert. denied*, 454 U.S. 927 (1981); *Engine Specialties, Inc. v. Bombardier Ltd.*, 605 F.2d 1 (1st Cir. 1979), *cert. denied*, 446 U.S. 983, 449 U.S. 890 (1980); *Calderone Enters. Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972). Application of those different tests, however, can lead to contradictory results. *See generally* Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 Yale L.J. 809, 835, 843 (1977); Handler, *The Shift From Substantive to Procedural Innovation in Antitrust Suits*, 71 Colum. L. Rev. 1, 27-31 (1971).

nite variety of claims that arise under the antitrust statutes, however, it has refused to fashion a black-letter rule for determining standing in every case. *Associated General Contractors*, 103 S. Ct. at 907-08 & n.33; *Blue Shield*, 102 S. Ct. at 2547 n.12. Instead each situation must be analyzed on its facts in light of several factors: the causal connection between an antitrust violation and the injured party,[13] the nature of the plaintiff's alleged injury,[14] and the directness or indirectness of the asserted injury.[15] *Associated General Contractors*, 103 S. Ct.

---

13. Claims that a defendant specifically intended to harm the plaintiff, however, are not of controlling significance. Although a defendant's improper motive may sometimes support a damages claim under §4, it "is not a panacea that will enable any complaint to withstand a motion to dismiss." *Associated Gen. Contractors*, 103 S. Ct. at 908 & nn.25, 26.

14. A claimed injury must be of the type that Congress sought to redress in providing a private damage remedy, and it must flow "from that which makes defendants' acts unlawful." *Blue Shield*, 102 S. Ct. at 2550 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1979)); *see Associated Gen. Contractors*, 103 S. Ct. at 908-09.

15. Note that analyzing the directness or indirectness of the asserted injury for purposes of standing under §4 implicates many of the same concerns identified in *Hawaii v. Standard Oil* and *Illinois Brick*. Those concerns include the existence of a separate class of persons whose self-interest will normally motivate them privately to enforce the antitrust laws through §4, the speculative nature of damages resulting from indirect effects of antitrust violations, the potential for duplicative recovery, and the danger of complex apportionment of damages. *Associated Gen. Contractors*, 103 S. Ct. at 910-12; *see* Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term - 1977*, 77 Colum. L. Rev. 979, 994-97 (1977). Thus in *Mid-West Paper Products* we traced the policies of *Illinois Brick* in determining whether a direct purchaser from an antitrust violator's competitors had standing to sue for treble damages allegedly resulting from those purchases. We held that under such an "umbrella" theory the direct purchasers of the defendant's competitor had no standing to sue. 596 F.2d 573, 580-87 & nn.24, 25 (3d Cir. 1979); *cf. In re Coordinated Pretrial Proceeding*, 691 F.2d at 1339-41 & n.6 (*Illinois Brick* and not standing analysis applicable to action brought by indirect purchaser under "umbrella" theory).

at 907-13.[16] The Court's case-by-case approach reflects the fact that "§4 standing analysis is essentially a balancing test comprised of many constant and variable factors and that there is no talismanic test capable of resolving all §4 standing problems." *Bravman v. Bassatt Furniture Industries*, 552 F.2d 90, 99 (3d Cir.), *cert. denied*, 434 U.S. 823 (1977) (standing determined by "factual matrix"); *see Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 581-82 (3d Cir. 1979); *Cromar Co. v. Nuclear Materials and Equipment Corp.*, 543 F.2d 501, 508-09 (3d Cir. 1976).

12. The two types of limitations on the section 4 remedy discussed above represent the judiciary's attempts to give shape to the statute's broad mandate in light of congressional intent and statutory policy.[17] They are not hard and fast rules that will dictate the result in every case. Rather they are principles "that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances." *Associated General Contractors*, 103 S. Ct. at 908. Only by the careful application of those principles to the multitude of claims that potentially are swept within the scope

---

16. In *Blue Shield* the Court stated:

> In applying [the] elusive concept [of §4 standing] to this [antitrust] action, we look (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and, (2) more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under §4.

102 S. Ct. at 2548.

17. While recognizing those two limitations, the Supreme Court was careful to state: "Consistent with the congressional purpose, we have refused to engraft artificial limitations on the §4 remedy. . . . [I]n the absence of some articulable consideration of statutory policy suggesting a contrary conclusion in a particular factual setting, we have applied §4 in accordance with its plain language and its broad remedial and deterrent objectives." *Blue Shield*, 102 S. Ct. at 2545 (footnote omitted).

of section 4 can courts properly effectuate Congress' antitrust policies of deterring antitrust violators and compensating victims of anticompetitive behavior.

III

A

13. In its motion to dismiss before the district court, Caterpillar urged that Appellees were indirect purchasers of Caterpillar's products and thus, under the rule of *Illinois Brick*, were not within the class of persons able to maintain a treble damage action under section 4. Specifically Caterpillar argued that Appellees claims were based on a pass-on theory — *i.e.* that Appellees suffered some form of economic injury only when and if an independent Caterpillar-authorized dealer made a decision to raise his prices in response to the smaller discount given on sales of generator sets to be used outside his service territory. Thus, Caterpillar argued that even assuming Appellees could prove that a "penalty" was passed on to them by OMCO,[18] as indirect purchasers of Caterpillar's products, Appellees are barred from suing Caterpillar by *Illinois Brick*. App. at 88D-89D.

14. In denying Caterpillar's motion, however, the district court based its conclusion that *Illinois Brick* did not act as a bar to Appellees' suit on the analytically distinct issue of whether Appellees had "standing" to maintain an action for damages. The district court assumed that Appellees were the "direct targets" of an unlawful conspiracy and that, as a result of that conspiracy, they were forced out of business. It then concluded that "[i]f it is looked at from that light, . . . clearly [Appellees] would be entitled to recover and would have standing to maintain an action for damages" under *Illinois Brick* and *Blue Shield*. App. at 452I.

18. For the purposes of the instant appeal we must assume that Appellees can prove the facts alleged in their amended complaint. *Associated Gen. Contractors*, 103 S. Ct. at 902.

15. We think that the district court misconstrued the inquiry to be conducted under the rule of *Illinois Brick*. The issue is not whether Appellees have sustained injuries too remote to give them standing or whether they are the direct targets of an alleged conspiracy, but rather whether they are in the class of persons considered to be injured in their business or property under section 4 by an antitrust violation. *Blue Shield*, 102 S. Ct. at 2546-47; *Illinois Brick*, 431 U.S. at 728 n.7. To make the latter inquiry, a district court must focus on the possibility of duplicative recovery and the potential for overly-complex damage claims if a damage suit is allowed. *Blue Shield*, 102 S. Ct. at 2546 & n.11. Although those concerns were mentioned in oral argument at the hearing, *see* app. at 415I-16I, 443I, the district court did not explicitly address either of those two concerns when denying Caterpillar's motion, app. at 450I-53I. We hold that that omission was error. To consider properly the issue raised by Caterpillar's motion the inquiry must be whether, in light of the policies underlying *Illinois Brick*, are Appellees in the group of private attorneys general created by Congress to redress Caterpillar's assumed antitrust violation through use of the treble damage remedy?[19]

B

16. Appellees make two arguments why *Illinois Brick* is not a bar in the instant case. First they assert that it is simply inapplicable to the restraints alleged in their complaint. They argue that the rule of *Illinois Brick* is limited to the facts of that case — a claim of horizontal price fixing brought by indirect purchasers. In

19. We do not suggest that standing issues should have been ignored by the district court, only that they limit the §4 remedy in a different way. For the purposes of this appeal, Caterpillar has conceded that Appellees would have standing if their claims are not barred by *Illinois Brick*. Brief of Appellant at 5 n.4.

support of their very narrow reading of the rule's scope, Appellees seize upon language in *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979). *Mid-West Paper Products* was a suit brought by several groups of plaintiffs against manufacturers of consumer bags. In our opinion in that case, we observed that *Illinois Brick* allowed a direct purchaser to sue defendants who had fixed prices above the competitive market price because the benefit derived by the defendants was readily ascertainable. Thus a damage action "would [not] transform [that] antitrust litigation into the sort of complex economic proceeding that the *Illinois Brick* Court was desirous of avoiding if at all possible." 596 F.2d at 585 (footnote omitted). We went on to state in a footnote:

> A different problem is presented where prices are fixed below the competitive market price or where defendants engage in other forms of anticompetitive conduct, such as group boycotts, vertical restrictions, or monopolization, since defendants' benefits in those instances are not so readily ascertainable, and may not be sufficient to compensate "those individuals whose protection is the primary purpose of the antitrust laws." In such circumstances courts have awarded damages based upon the amount of injury suffered by the plaintiff rather than the benefits derived by the defendants.

Id. at n.47. Appellees read footnote forty-seven as holding that claims of below-market price fixing, boycotts, vertical restrictions, and monopolization are *per se* outside the purview of *Illinois Brick*. Characterizing their claim as a challenge to Caterpillar's "effort to boycott and to eliminate plaintiffs' class of competitors from competing in the market . . . through the innovative mechanism of a vertically-imposed economic penalty," Brief of Appellees at 25, they conclude that this case is outside the rule of *Illinois Brick*.

17. We disagree. We do not read *Mid-West Paper Products* as holding that claims other than those of above-market horizontal price fixing are always outside the scope of *Illinois Brick*. Instead we read footnote forty-seven as observing that in certain situations the measure of damages for direct purchasers is based upon the injury suffered by the plaintiff, not the benefit obtained by the defendant. When defendants engage in below-market price fixing, group boycotts, vertical restraints, or monopolization, their benefits are sometimes not "readily ascertainable" and thus damages sought by proper plaintiffs must be measured by other means.

18. Our refusal to limit the rule of *Illinios Brick* solely to claims of certain horizontal price restraints is consistent with decisions in this and other courts. In *Edward J. Sweeny & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981), we held that under *Illinois Brick* indirect purchasers could not assert claims for damages under sections *1 and* 2 of the Sherman Act. 637 F.2d at 122; *accord In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1157 (5th Cir. 1979) ("Absent exceptional circumstances, *Illinois Brick* and *Hanover Shoe* limit the use of passing-on theory in antitrust actions without regard to the parties' characterization of the offense."), *cert. denied*, 449 U.S. 905 (1980); *cf. Hanover Shoe*, 392 U.S. at 487 (monopolization case). In *Zinser v. Continental Grain Co.*, 660 F.2d 754, 760-61 (10th Cir. 1981), *cert. denied*, 455 U.S. 941 (1982), the court relied on *Illinois Brick* to bar indirect sellers from challenging a below-market price fixing scheme. In *Stein v. United Artists Corp.*, 691 F.2d 885, 895 (9th Cir. 1982), the court applied *Illinois Brick* to bar a claim for damages based on an allegation that a defendant had illegally boycotted a corporation of which plaintiffs were creditors and guarantors. All of those cases recognize that the availability of the section 4 remedy depends not on the plaintiff's characterization of the illegal activity but on whether the problems identified in

Illinois Brick would be avoided if relief were allowed. *See Blue Shield*, 102 S. Ct. at 2546 (Court examines underlying policies to determine whether *Illinois Brick* bars damage suit for alleged illegal boycott).[20] Thus the scope

---

20. The cases relied on by Appellees, *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1246 (E.D. Pa. 1980), and *Royal Printing Co. v. Kimberly-Clark Corp.*, 621 F.2d 323 (9th Cir. 1980), are inapposite. In *Zenith* plaintiffs claimed that "virtually the entire Japanese consumer electronics product industry," had participated in a massive unitary conspiracy to flood the American market with inexpensive goods with the purpose of destroying the United States domestic consumer electronics product industry. Plaintiffs alleged violations of several statutes, including §§1 and 2 of the Sherman Act. The defendants moved to dismiss under *Illinois Brick*, claiming that Zenith could only prove it was injured by showing that the alleged injury directly inflicted on Zenith's distributors was passed on to Zenith through its distribution chain. In analyzing the motion the district court was careful to point out that Zenith's situation involved two manufacturers competing with each other and not, as in this case, the *Illinois Brick* situation of a seller-purchaser relationship within a single chain of distribution. 494 F. Supp. at 1250, 1252-53, 1256. The court stated, "we perceive the principal teaching of *Mid-West* to be that the applicability of the *Illinois Brick* rule to fact patterns which diverge from the model of a single distribution chain should be determined by assessing, in each factual situation, the weight of the policies articulated by the Supreme Court in *Illinois Brick* and by the Third Circuit in *Mid-West*." *Id.* at 1253. After examining the unique facts of that case in light of those policies, the district court denied the motion. We find *Zenith* completely consistent with our analysis that, in examining *Illinois Brick* problems, courts must evaluate each case in light of the policies underlying the rule.

Nor does *Royal Printing* offer support for Appellees' position. That case involved violations of §1 of the Sherman Act alleged by several small retail businesses against ten of the nation's largest manufacturers of paper products. On a motion to dismiss under *Illinois Brick*, the court held that an indirect purchaser could sue for damages when it had made its purchases from a subsidiary or division of a co-conspirator, even if the pricing decision of such a subsidiary or division was determined by market forces. 621 F.2d at 326-27 & n.4. The court went on to hold that purchases made through independent wholesalers, however, were barred. *Id.* at 327-28. The *Royal Printing* decision parallels the exception to *Illi-*

of *Illinois Brick's* rule barring treble damage actions by certain persons must be determined in each case by examining whether allowing those persons to sue could create the possibility of duplicative recovery and overly-complex damage claims.[21]

19. Appellees' second argument is that even examining their claims in light of the policy concerns of *Illinois Brick*, they should not be barred from seeking treble damages. Appellees do not contend that they fall within any of the recognized exceptions to the *Illinois Brick* rule.[22] Instead they rely on an affidavit executed by

---

nois Brick that we recognized in *In re Sugar Indus. Antitrust Litig.*, 579 F.2d 13 (3d Cir. 1979). In that case we held that an antitrust violator cannot evade liability "by the simple expedient of inserting a subsidiary between the violator and the first uncontrolled purchaser." *Id.* at 19. While our view of the exception is somewhat narrower than that of the Ninth Circuit, *see Mid-West Paper Prods.*, 596 F.2d at 589 (violator must dominate subsidiary's prices in accordance with the general price fixing conspiracy), the exception in any form is inapplicable to this case. In its complaint Appellees admit that OMCO, the direct purchaser in this case, is not a subsidiary of Caterpillar but rather an independent dealer. Complaint at ¶¶8, 13; app. at 9B, 11B. Thus under either *Royal Printing* or *Mid-West Paper Prods.*, Appellees would be barred by the rule of *Illinois Brick*.

21. Another difficulty with Appellees' argument is their *post hoc* characterization of Caterpillar's activity as a "boycott." Appellees' complaint does not allege that anyone ever refused to sell them generator sets, only that the sets cost more because of the service fee imposed by Caterpillar on OMCO. The primary act they challenge is the imposition of an unlawful penalty on Caterpillar's dealers, a claim very similar to the overcharges involved in *Illinois Brick*. Complaint ¶22, app. at 18B-19B; *cf. Jewish Hosp. Ass'n v. Stewart Mechanical Enters., Inc.*, 628 F.2d 971, 977 (6th Cir. 1980) (court rejects belated attempt to recharacterize claim made in complaint so as to avoid *Illinois Brick*), *cert. denied*, 450 U.S. 966 (1981).

22. The Supreme Court noted two exceptions in *Illinois Brick*. Where there exists a fixed quantity, cost-plus contract between the direct purchaser and its customer or where the direct purchaser is owned or controlled by its customer the indirect purchaser would not be barred by the rule of *Illinois Brick*. 431 U.S. at 735-36 &

OMCO's president and offered by Caterpillar in support of its motion to dismiss. That affidavit states in pertinent part:

> Neither the existence of the 5% [service fee] nor any changes in Caterpillar's administration thereof, including the 1978 or 1980 changes, has had any apparent effect on Ohio Machinery's incentive or ability to sell Caterpillar electric generators sets outside its service territory generally or in Saudi Arabia specifically.

App. at 110E. Appellees contend that OMCO's affidavit "denies absolutely that OMCO suffered any damage from Caterpillar's warranty fee system. OMCO has thereby vitiated any opportunity it might have had to sue successfully for damages as a result of the same purchases which are the subject of the present action." Brief of Appellees at 34. Appellees argue that the possibility of duplicative damages is thus avoided.

20. First, Appellees make no claim in their *complaint* that OMCO would not sue in the instant case. Appellees allege that Caterpillar and its co-conspirators have imposed an unlawful penalty upon OMCO which has prevented OMCO from distributing generator sets in territories and to customers of its own choosing. Without

---

NOTE — *(Continued)*

n.16. We relied on the latter in holding that in certain circumstances, an indirect purchaser could sue when it had purchased goods from the subsidiary of an antitrust violator. *Mid-West Paper Prods.*, 596 F.2d at 577 n.8, 589; *In re Sugar Indus. Antitrust Litig.*, 579 F.2d at 18-19; *see* note 22 *supra*. Some lower courts have recognized a third "vertical-conspiracy exception" to *Illinois Brick*. *See, e.g., Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478, 481 (7th Cir. 1980); *In re Mid-Atlantic Toyota Antitrust Litig.*, 516 F. Supp. 1287, 1294-96 (D. Md. 1981). Because Appellees disavow any reliance on such an "exception," Brief of Appellees at 36 n.26, we do not have to decide whether we would recognize its existence. *See In re Coordinated Pretrial Proceedings*, 691 F.2d at 1341 n.9.

deciding the issue, we note that it is possible that OMCO could make out a cause of action under the antitrust laws on those facts. *See Eiberger v. Sony Corp. of America*, 622 F.2d 1068 (2d Cir. 1980). Second, it is not clear to us that OMCO's affidavit precludes it from suing Caterpillar. The fact that Caterpillar's service fee did not affect OMCO's ability to sell generator sets does not necessarily mean OMCO was not damaged by Caterpillar's policy. It could merely reflect that demand for the sets in Saudia Arabia was relatively inelastic with respect to price. OMCO could still claim that its profit margin was less due to imposition of the fee. Third, the Supreme Court recognized in *Illinois Brick* that it was possible that direct purchasers might not sue their suppliers in all cases. "But on balance . . . we conclude that the legislative purpose in creating a group of 'private attorneys general' to enforce the antitrust laws under §4 . . . is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it." 431 U.S. at 746. We do not know if, in fact, OMCO is going to sue Caterpillar. If it does, however, it would be claiming treble damages for injuries arising from the very same transactions involved in this case. Thus the risk of duplicative recovery is clearly present in this case, a danger the Court sought to avoid through application of the *Illinois Brick* rule.[23]

---

23. Before the district court Appellees suggested that the danger of duplicative recovery was not present in this case because they were suing not to recover the fee imposed by Caterpillar, but to recover the separate damages of Appellees' lost business and profits resulting from application of that fee to OMCO. App. at 438I-39I. Appellees admitted, however, that the issues were intertwined and that the damage calculation would concentrate on the increased amount OMCO had to pay for the sets. App. at 440I. Furthermore, by arguing that their damages are their lost profits *resulting* from Caterpillar's imposing the service fee on OMCO, Appellees implicate the second concern of *Illinois Brick*, that of overly complex and speculative damage theories. *See also* app. at 414I-15I.

21. Appellees also contend that their damage claim does not present a problem of "massive evidence and complicated theories." *Illinois Brick*, 431 U.S. at 741 (quoting *Hanover Shoe*, 392 U.S. at 493). To prove any damages, however, Appellees would have to calculate the service fee on each generator set purchased by OMCO, determine how the imposition of the fee and market forces affected the price paid by Appellees,[24] and finally estimate how any increased price affected Appellees' profits and sales in light of competitive market forces in Saudi Arabia. That type of calculation was the very analysis the Supreme Court sought to avoid in *Illinois Brick*, 431 U.S. at 741-43. We recognize that damage analysis in antitrust actions is often difficult and complex. The instant case, however, presents damage issues which are sufficiently uncertain so as to impair the effectiveness of the section 4 remedy.

IV

22. We hold that, based on facts alleged in their complaint, Appellees are barred from seeking treble damages under section 4 of the Clayton Act by operation of the rule of *Illinois Brick*. The possibility of duplicative recovery if the direct purchaser brings suit and the potential for complex apportionment of damages lead us to conclude that Appellees are not persons injured in their business or property by reason of a violation of the antitrust laws within the meaning of section 4. Our anal-

---

24. In the affidavit relied on by Appellees, OMCO's president stated:

> In its dealings with Merican companies with respect to Caterpillar gensets and related products, Ohio Machinery negotiated with the Merican companies on an individual transaction by transaction basis. The price, delivery, and other terms varied from transaction to transaction, depending upon a myriad of considerations.

App. at 111E.

ysis is tempered by our recognition that the antitrust laws are written broadly to ensure rigorous enforcement of congressional policy. On the facts of this case, however, we find that the policies underlying *Illinois Brick* preclude Appellees from maintaining suit.

23. We will reverse the district court's order of July 2, 1982, as amended on August 16, 1982, and we will remand the case for further proceedings consistent with this opinion.

A. LEON HIGGINBOTHAM, JR., *Circuit Judge*, dissenting.

I agree with the majority's conclusion that in focusing only on plaintiffs' standing to sue, the district court failed properly to determine whether, under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the potential for double recovery and excessive complexity bars plaintiffs from recovering treble damages under §4 of the Clayton Act. I also agree that *Illinois Brick* cannot be mechanically applied so that an antitrust plaintiff's ability to recover turns upon the affixing of handy labels to the nature of the wrong alleged or to the plaintiff's position in the marketing hierarchy. The majority and I differ, however, on whether the policies underlying §4 and *Illinois Brick* would be advanced by denying plaintiffs the opportunity to continue with this action. In my view, the prosecution of this suit would be both consistent with *Illinois Brick* and necessary to avoid immunizing the anti-competitive tactic that plaintiffs allege. Moreover, this court's discussion of the sweep of *Illinois Brick* in *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979), supports my conclusion that plaintiffs' injuries are not of the kind contemplated by the *Illinois Brick* Court.

I begin with the Supreme Court's recent decision in *Blue Shield of Virginia v. McCready*, 50 U.S.L.W. 4723 (U.S. June 21, 1982). There, in the course of determining that the plaintiff-patient had standing to sue the insurer selected by her employer, the Court demonstrated its reluctance to allow alleged anti-competitive conduct to go unchallenged merely for want of a direct relationship between plaintiff and defendant. In discussing *Illinois Brick*, the *Blue Shield* Court noted:

> If there is a subordinate theme to our opinions in [*Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972)] and *Illinois Brick*, it is that the feasibility and consequences of implementing particular damages theories may, in certain limited circumstances, be considered in determining who is entitled to prosecute an action brought under §4. *Where consistent with the broader remedial purposes of the antitrust laws*, we have sought to avoid burdening §4 actions with damages issues giving rise to the need for "massive evidence and complicated theories," *where the consequence would be to discourage vigorous enforcement* of the antitrust laws by private suits.

50 U.S.L.W. at 4725 n.11 (quoting *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 393 U.S. 481, 493 (1968)) (emphasis added). Thus, we should be mindful not only of the twin concerns behind the *Illinois Brick* rule, but also of the overarching policy favoring "compensating victims of antitrust violations for their injuries and deterring violators by depriving them threefold of 'the fruits of their illegality,' while at the same time furthering the overriding goal of the antitrust laws — preserving competition." *Mid-West Paper Products*, 596 F.2d at 583 (footnotes omitted).

Illinois Brick concerned horizontal price-fixing above market price; here, however, plaintiffs alleged the existence of a vertical price-fixing conspiracy. Although the majority correctly determines that mere nomencla-

ture cannot magically obviate consideration of the *Illinois Brick* issue, the differences between the injuries alleged here and those contemplated in *Illinois Brick*, require us to ask whether the goals of avoiding duplicative recovery and excessive complexity would be advanced by barring this suit.

This court observed in *Mid-West Paper Products* that "when defendants have fixed prices above the competitive market price, where the benefit derived by them is readily ascertainable, the objectives of the treble damage action are fulfilled when the defendants are required to pay the direct purchasers three times the overcharge." *Id.* at 585 (footnote omitted). In the classic *Illinois Brick* circumstance, the price-fixer's benefit is commensurate with the purchasers' injury. Thus, if both direct purchaser and indirect purchaser seek recovery of the amount of the overcharge, duplicative recovery is likely. *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 494 F.Supp. 1246, 1255 (E.D.Pa. 1980) (Becker, J.) (discussing *Mid-West Paper Products*). The same is not necessarily true, however, where the wrong alleged differs from the kind of anti-competitive act that was the focus of *Illinois Brick*:

> A different problem is presented where prices are fixed below the competitive market price or where defendants engage in other forms of anticompetitive conduct, such as group boycotts, vertical restrictions, or monopolization, since defendants' benefits in those instances are not so readily ascertainable, and may not be sufficient to compensate "those individuals whose protection is the primary purpose of the antitrust laws." In such circumstances courts have awarded damages based upon the amount of injury suffered by the plaintiff rather than the benefits derived by the defendants.

Mid-West Paper Products, 596 F.2d at 585 n.47 (quoting *Cromar Co. v. Nuclear Materials and Equipment*

Corp., 543 F.2d 501, 505 (3d Cir. 1976)). The majority, apparently focusing on the second quoted sentence, reads this discussion in *Mid-West Paper Products* as dealing only with the appropriate measure of damages. *See* majority opinion, typescript at 21. I disagree. I think it is clear from the context of footnote 47 and from its emphasis on compensating the antitrust plaintiff that where an indirect purchaser has suffered injury other than incurring the cost of the passed-on overcharge, neither the policy of compensating injury nor that of deterring anti-competitive conduct can be realized unless the indirect purchaser can bring action against the seller. In the instant case, for example, plaintiffs alleged loss of sales and profits, reduction in the value of goodwill, and destruction of a significant portion of their businesses. Complaint at 14, *reprinted in* app. at 20B. Many of these alleged injuries are unique to the plaintiffs, and their complaint comprises more damage than the intermediary Ohio Machinery Company could recover were it to bring its own action. By putting treble damages outside of plaintiffs' reach, the majority effectively places complete recovery outside of anyone's reach. Under the majority's approach, plaintiffs cannot be made whole — notwithstanding the impossibility of duplicative recovery — and defendants cannot be made to give up the fruits of an alleged illegality.

Turning to the desire to avoid complexity, I consider it in its larger context. I do not read *Illinois Brick* to be concerned with protecting the courts from abstract economic theorizing so much as promoting vigorous policing of the marketplace. The *Illinois Brick* Court feared that tracing and allocating overcharges would seriously undermine the enforcement effectiveness of the treble damages action. 431 U.S. at 737, 745-47. What I stated before in the context of antitrust standing bears equally on the issue now before us:

> The Court in *Illinois Brick* was concerned with allowing the injection of complex issues into antitrust

> actions because the injection of such complexity would increase the cost of litigation and thereby discourage the enforcement of the antitrust laws. . . .
>
> . . . Where added complexity does not result in a disincentive to the enforcement of the antitrust laws, its potency as an argument against standing is seriously diminished.

Mid-West Paper Products, 596 F.2d at 599 (Higginbotham, J., dissenting). Likewise, allowing the instant suit to go forward is necessary to the attainment of the goal of deterrence. The anti-competitive conduct plaintiffs complain of cannot otherwise be policed. This is not a case where passed-on overcharges are so splintered that no indirect purchaser will be interested in pursuing relief; here, plaintiffs allege predatory destruction of their business — a complaint which only they may bring.

Nor do I believe that *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981), compels a different result. The abbreviated, one-paragraph discussion of the *Illinois Brick* issue in that case includes no statement of rationale and no examination of the policies that underlie §4 and *Illinois Brick*. To the extent that it can be read to bar relief to any plaintiff who falls into the category of "indirect purchaser," I do not believe that *Sweeney* survives the Supreme Court's decision in *Blue Shield*.

I would affirm the district court's denial of defendant's motion to dismiss.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

THE COURT: All right, thank you very much. The defendant Caterpillar Tractor Company has filed a motion to dismiss and/or for summary judgment, based first on, primarily I believe on the fact that the claim of plaintiff in this case is that of an indirect purchaser and that therefore would be precluded from bringing an action for damages under Section IV under the doctrine of Illinois Brick Company versus Illinois 431 U.S. 720.

The basic contention of this case as I understand it is that a Saudi Arabian Corporation and a manufacturer, Caterpillar Tractor, conspired to inaugurate a warranty fee arrangement, the effect of which would require a dealer who sold a generator, electric genset that would eventually be used out of that dealer's territory, would require the dealer to pay a warranty fee of 5 percent, which would not be refunded to the dealer irrespective of whether or not any claim was made under the warranty agreement.

The intention being that this interfered with the rights of an independent dealer such as plaintiff from purchasing through an authorized dealer at a lower price, and thereby being able to compete in other territories.

The contention that the plaintiff is a second purchaser, as it were or not the direct purchaser from the Caterpillar Tractor Company, and therefore is precluded under the doctrine of Illinois Brick, it seems to me it would not be applicable in this case, particularly in view of the very recent decision of the U.S. Supreme Court in Blue Shield of Virginia versus McCready, which was just decided on June 21, 1982.

I have studied the Blue Shield case as carefully as I can and I must confess that I have a great deal of difficulty in understanding or at least forecasting the full effect of that opinion.

I think that it is rather clear, however, from Blue Shield of Virginia that the Supreme Court is suggesting that it is improper to just mechanically apply the Illinois Brick doctrine and thereby exclude in every case anybody who is not a direct purchaser from the original seller or the manufacturer.

I see no other reason for the Blue Shield case and the opinions or the opinion which it developed other than to make it clear that the Illinois Brick case should not be given a very wide or broad interpretation as some of the lower Courts may have been doing.

I also think that this Circuit in Mid-West Paper Products versus Continental Group, Inc., 596 F.2d 573 (1979) in an opinion by Judge Adams to some extent forecasts, foreshadowed the view of the Supreme Court, in Blue Shield of Virginia in which it suggested that the cases must be analyzed analytically to determine whether or not there is a possible violation of the antitrust laws, and whether or not the plaintiff, the party seeking recovery, comes within the protection of the antitrust laws, so as to permit it to seek damages.

In this particular case plaintiffs' contention is that the plaintiff itself was a direct target of an unlawful conspiracy and that as a result of that conspiracy it was forced out of business.

It is true that in carrying out that conspiracy in effect it was aimed in such a way that prices that the plaintiff would have to pay for the products were increased, but as I understand it, the injury is not the increased price itself, but simply that the increased price is what brought about injury such as forcing plaintiffs out of business and lost profits.

It would seem to me that the antitrust laws are, among other things, very definitely for the purpose of protecting businesses from being the target of a conspiracy to drive them out of business. If it is looked at from that light, then clearly they would be entitled to recover and would have standing to maintain an action for damages.

There has also been certain contentions of lack of jurisdiction because of it not showing a sufficient effect on international commerce, and it seems to me under all of the contentions of the plaintiff in this case, that clearly there would be jurisdiction in this Court.

As I say I am not sure of the extent or the proper interpretation of Blue Shield but as I read it, it would appear to me that this type of activity which is alleged in the complaint is such that would permit plaintiff to maintain its action for damages.

Therefore, the motion to dismiss and the motion for summary judgment on behalf of defendant will be denied.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MERICAN, INC., et al	*	CIVIL ACTION
v.	*	
CATERPILLAR TRACTOR CO.	*	NO. 80-3723

AMENDED ORDER

It is ordered that the order entered in open court at the conclusion of oral argument on July 2, 1982, denying defendant's motion to dismiss and/or for summary judgment for the reasons stated in open court, is hereby amended to be as follows:

It is ordered that the motion of the defendant, Caterpillar Tractor Co., to dismiss the complaint or, in the alternative, for summary judgment in favor of the defendant is denied.

The undersigned district judge hereby states and certifies that in his opinion this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may and will materially advance the ultimate termination of the litigation. The said controlling question of law is as follows:

> When an alleged conspiracy between an electrical generator manufacturer and one of its authorized foreign dealers is formed to hinder and/or exclude intra-brand competition in the foreign market by an independent, non-factory authorized dealer who purchases from other authorized dealers for resale in the foreign market, whereby the manufacturer imposes a non-refundable "5% warranty service fee" on all sales by authorized dealers when the generators are to be installed for initial use outside of the authorized selling dealer's assigned geographical service territory, is the "target-victim" of the conspiracy (the independent non-factory authorized dealer) precluded from maintaining a private damage action against the manufacturer under Section 4 of the Clayton Act (15 U.S.C. §15) by operation of the rule of Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)?

It is therefore further ordered that the foregoing question be certified for interlocutory appeal, pursuant to 28 U.S.C. §1292(b), to the United States Court of Appeals for the Third Circuit.

BY THE COURT

Donald W. VanArtsdalen

August 16, 1982.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 82-1577

MERICAN, INC. and MERICAN

CURTIS, INC. and MERICAN

CURTIS, LTD.

vs.

CATERPILLAR TRACTOR CO.

(D.C. Civil No. 80-3723)

ON APPEAL FROM THE UNITED STATES

DISTRICT COURT FOR THE EASTERN

DISTRICT OF PENNSYLVANIA

Present: HUNTER and HIGGINBOTHAM,

Circuit Judges; and

GERRY, District Judge.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on April 12, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the

order of the said District Court, filed July 2, 1982 and entered July 6, 1982, as amended by order entered August 16, 1982, be, and the same is hereby reversed and the cause remanded to the said district court for further proceedings consistent with the opinion of this Court. Costs taxed against appellees.

ATTEST:

Sally Mrvos
Clerk

July 26, 1983

*Honorable John F. Gerry, United States District Judge for the District of New Jersey, sitting by designation.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 82-1577

MERICAN, INC.; MERICAN CURTIS, INC.; and

MERICAN CURTIS, LTD.,

Plaintiffs/Appellees

v.

CATERPILLAR TRACTOR CO.,

Defendant/Appellant

SUR PETITION FOR REHEARING

Present SEITZ, Chief Judge, ALDISERT,

ADAMS, GIBBONS, HUNTER, WEIS, GARTH,

HIGGINBOTHAM, SLOVITER, BECKER,

Circuit Judges

The petition for rehearing filed by

PLAINTIFFS-APPELLEES

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active

service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judges Gibbons, Higginbotham, Sloviter and Becker would grant the petition for rehearing.

By the Court,

James Hunter
Judge

Date Sep 9 1983

APPENDIX F

STATUTES INVOLVED

Sherman Act, Section 1, 15 U.S.C. 1 provides in pertinent part:

> Every contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is declared to be illegal . . .

Clayton Act, Section 4, 15 U.S.C. §15 provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

FEB 17 PAGE 3
TO BE REPRINTED

No. 83-914

Supreme Court, U.S.
FILED
FEB 9 1984
ALEXANDER L. STEVAS
CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1983

MERICAN, INC.; MERICAN CURTIS, INC.; AND MERICAN CURTIS, LTD.,

Petitioners,

v.

CATERPILLAR TRACTOR CO.,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROBERT G. LEVY,
BERRYL A. SPEERT,
ALLAN P. HILLMAN,
JOHN M. BELFERMAN,
FRANK, BERNSTEIN, CONAWAY AND GOLDMAN,
1300 Mercantile Bank and Trust Building,
2 Hopkins Plaza,
Baltimore, Maryland 21201,
Telephone: (301) 625-3500.

February 9, 1984

The Daily Record Co., Baltimore, MD 21202

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
ARGUMENT	3
CONCLUSION	10

APPENDIX

A Opinion of the United States Court of Appeals for the Second Circuit in Crimpers Promotions, Inc. v. Home Box Office, Inc.

TABLE OF AUTHORITIES

Cases — Page

Associated General Contractors of California, Inc. v. California State Council of Carpenters, ___U.S. ___, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983).....3,8

Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982).....3,5,7,8

Crimpers Promotions, Inc. v. Home Box Office, Inc., Docket No. 83-7364, 1984-1 Trad.Cas. ¶65,772 (2d Cir. December 12, 1983).....2, passim

Crimpers Promotions, Inc. v. Home Box Office, Inc., 554 F. Supp. 838 (S.D.N.Y. 1982), aff'd, 1984-1 Trad. Cas. (CCH) ¶65,772 (2d Cir. 1983).....6

Hawaii v. Standard Oil Co., 405 U.S. 251 (1972).....8

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).....2,4,7,8,9

Merican, Inc. v. Caterpillar Tractor Co., 713 F.2d 958 (3d Cir. 1983).....1, passim

Statutes

15 U.S.C. § 1 (Section 1 of the Sherman Act).....4,5

Page

15 U.S.C. § 15 (Section 4 of the Clayton Act).....2,7

28 U.S.C. § 1292(b).....2

RULES

Rule 17.1(a) of the United States Supreme Court.....10

Rule 17.1(c) of the United States Supreme Court.....10

Rule 21.1(f) of the United States Supreme Court.....2

Rule 22.6 of the United States Supreme Court.....1

Rule 28.1 of the United States Supreme Court.....2

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-914

MERICAN, INC.; MERICAN CURTIS, INC.;
and MERICAN CURTIS, LTD.,

Petitioners

v.

CATERPILLAR TRACTOR CO.,

Respondent

SUPPLEMENTAL BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PRELIMINARY STATEMENT

In accordance with Rule 22.6 of this Court, plaintiffs-petitioners ("plaintiffs") submit a new case not available at the time of the filing of their Petition for a Writ of Certiorari ("Petition"). The new case is the unanimous opinion of the United States Court of Appeals for the Second Circuit (Hon. Henry J. Friendly,

Cir. J.) in Crimpers Promotions, Inc. v. Home Box Office, Inc., Docket No. 83-7364, decided December 12, 1983 ("Crimpers"). As in the divided panel opinion from which review is sought, Merican, Inc. v. Caterpillar Tractor Co., 713 F.2d 958 (3d Cir. 1983) (Appendix A to the Petition, hereinafter "Pet. App. A."), Crimpers involved a question certified under 28 U.S.C. § 1292(b). The Crimpers opinion is reproduced as Appendix A hereto and is unofficially reported in 1984-1 Trad. Cas. (CCH) ¶65,772 (2d Cir. 1983).[1]

The pragmatic approach of Crimpers (and of the District Court and the panel dissent in Merican) reflects the pro-enforcement rationale and the refusal to exalt form over substance

---

[1] In 1982, the District Court in Merican upheld plaintiffs' right to sue for damages under Section 4 of the Clayton Act, 15 U.S.C. § 15, holding that Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) ("Illinois Brick") did not bar the damage claim (Pet. App. B). Following issuance of the divided panel opinion reversing the District Court (Pet. App. A) (with the votes of the two Circuit judges on the panel split) a petition for rehearing in banc was denied by vote of 6 to 4 (Pet. App. E). Plaintiffs' statement in accordance with Rule 28.1 of this Court is set forth in the Petition, page 2, n.2. In accordance with Rule 21.1(f), the statutes which this case involves are set forth in Appendix F to the Petition.

which underlies this Court's decisions in Illinois Brick Co., Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982) ("Blue Shield"), and Associated General Contractors of California, Inc. v. California State Council of Carpenters, ____ U.S. _____ 103 S.Ct. 897, 74 L.Ed.2d 723 (1983) ("Associated General Contractors").

ARGUMENT

Plaintiffs were independent competitors which purchased millions of dollars worth of Caterpillar electric generator sets in the United States from an authorized Caterpillar dealer and transported them overseas. Plaintiffs competed in the sale and service of these products with certain Caterpillar foreign authorized dealers, primarily in Saudi Arabia, the market for nearly two-thirds of worldwide exports of Caterpillar electric generator sets. Plaintiffs furnished service to, inter alia, the Saudi Arabian government. Plaintiffs allege that, at the behest of certain authorized Caterpillar dealers, primarily the Saudi Arabian dealer, and after giving assurances that steps would be taken to eliminate such competition, Caterpillar and these dealers conspired to eliminate competition by plaintiffs and other

such independent marketers in the marketing and servicing of the generator sets by means of an innovative restraint in violation of Section 1 of the Sherman Act. The principal step taken was to effect a de facto boycott, by modifying a "warranty fee" system to transform a fee for service into an artificial penalty amounting to 20% of the margin between the wholesale and retail price of the generator sets, imposed upon plaintiffs' supplier whenever plaintiffs transferred the generator sets in United States foreign commerce, even though it was plaintiffs, and not any authorized Caterpillar dealer, which accomplished the necessary installation and warranty service for which the "fee" was ostensibly designed to compensate. The fee penalty was designed to and did make it economically impossible for plaintiffs to purchase the generator sets and to continue to compete. (See Petition, pp. i-ii and 3-17.)

This case is unlike the normal Illinois Brick horizontal price-fixing overcharge case in which the conspirators seek only an enhanced price and not elimination of a competitor or class of competitors. The District Court (Pet. App. B) and the panel dissent (Pet. App. A, pp.

23, 26-27) recognized that the goals of this Court's opinions would be served by allowing plaintiffs to recover antitrust damages. As the panel dissent concluded:

> By putting treble damages outside of plaintiffs' reach, the majority effectively places complete recovery outside of anyone's reach. . . . here plaintiffs allege predatory destruction of their business -- a complaint which only they may bring. (Pet. App. A, pp. 26-27.)

In Crimpers, the Second Circuit held that a plaintiff may sue for damages for, inter alia, an attempt to "boycott" it in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, though the underlying conspiracy was not aimed at plaintiff, but at the development of independent competition the growth of which plaintiff sought to encourage. As had this Court in Blue Shield, the Court in Crimpers (on facts less compelling than in Blue Shield) recognized that more than one party may recover as a result of an antitrust violation where the injuries are distinct.

There, defendants HBO and Show Time, the two dominant companies in the cable television (CATV) industry, were able to

purchase programming from independent producers at artificially low prices, because of their market power. They arranged programming in a network format, and resold it as a package to cable networks (operators). Plaintiff alleged that defendants sought to restrain trade in the buying and selling of CATV programming. The plaintiff sought to provide a forum, to bring together in one trade show all suppliers and buyers of CATV programming, so that buyers would not be dependent upon the defendants (middlemen) but could purchase programming from a diverse group of independent suppliers, inevitably reducing the power of defendants.

In order to maintain their dominance, defendants allegedly boycotted the trade show, and coerced independent suppliers, programmers and potential purchasers of programs to do the same, inter alia by threatening suppliers that if they participated, defendants would no longer purchase their programming. (Appendix A, pp. 2-5.) See also Crimpers District Court opinion, 545 F. Supp. 838, 840-41 (S.D.N.Y. 1982).

Affirming "unhesitatingly" (App. A, p. 3), the Second Circuit agreed with the District Court that arguments that plaintiff was not a

competitor of defendants, was not "aimed" at by the conspiracy, and was harmed only "incidentally" by acts in furtherance of the conspiracy, were unavailing particularly after this Court's decision in Blue Shield. Judge Friendly cited with approval the view that Blue Shield "appears to signal a rather broader reading of the standing requirements under Section 4 of the Clayton Act." (App. A, p. 6.)[2]

The issue of double recovery, emphasized by the panel in Merican and by Caterpillar in its brief in opposition to the present petition (e.g., p. 14), was also addressed in Crimpers. Heeding this Court's rule that courts must "abstain from black letter rules and . . . analyze the facts in each case" (App. A, p. 8),

---

2 Similarly, in Merican, the District Court rejected defense counsel's suggestion that Blue Shield was merely a restatement of general principles with respect, inter alia, to Illinois Brick, holding, "if that is all that Blue Shield stands for, then it would seem to me rather odd that the Supreme Court would even have accepted certiorari in the case" (3d Cir. Joint Appendix at 412-I). The District Court stated further that it was "clear" from Blue Shield that, contrary to the "very wide or broad interpretation" by some lower courts, "it is improper to just mechanically apply the Illinois Brick doctrine. . . ." (Pet. App. B, p. 2.)

the Second Circuit concluded that, though damages could be sought by Crimpers and by producers and buyers which might later sue, damages were sufficiently different so that antitrust enforcement was best served by allowing each of these parties to sue: "This is not the kind of double recovery which [Hawaii v. Standard Oil Co., 405 U.S. 251 (1972)] and Illinois Brick sought to prevent." (App. A, p. 10.)

Crimpers, attempting to "forge a link in a chain" of distribution, was also not too "remote" to sue for damages since its injury was, like plaintiff's in Blue Shield, "intertwined" with the injury which defendants sought to inflict on others. (App. A, p. 12.) Crimpers' case was held to be "more like (although stronger than) a boycott of a supplier. . . ." (App. A, p. 11.)

Judge Friendly found "no basis for believing that the position taken in McCready [Blue Shield] was altered in Associated General" (App. A, p. 13), in which this Court reiterated that it is "virtually impossible to announce a black-letter rule that will dictate the result in every case," with respect to whether a party may recover antitrust damages. (App. A, p. 15.) Factors militating in favor of according

such a right to Crimpers (and *a fortiori*, to plaintiffs in *Merican*) included the "central interest in protecting the economic freedom of participants in the market"; Crimpers' role as the logical plaintiff; the facts that its damages were neither overly complex nor a "double recovery" in the sense described by this Court; and Crimpers' status as a target of an act in furtherance of the overall conspiracy, where it sought to provide the means by which independent competition could develop and the market could function "without [the] paying [of] tribute to the defendants." (App. A, pp. 16-18.)

In *Merican*, plaintiffs were the targeted competitors. To deny them the right to sue for damages would amount to expanding *Illinois Brick* beyond its confines, and permitting creative draftsmanship to succeed in avoiding antitrust damage liability. As the Second Circuit observed in *Crimpers*, such a result would "run counter not only to the two most recent decisions of the Supreme Court, but to elementary common sense." (App. A, p. 18.)

Thus, the Third Circuit's divided opinion is not only contrary to this Court's pronouncements, but is contrary to their interpretation by the Second Circuit. Therefore,

review of Merican is appropriate under both Rules 17.1(a) and 17.1(c) of this Court.

CONCLUSION

For the foregoing reasons, and those set forth in plaintiffs' Petition for a Writ of Certiorari dated December 2, 1983, the Petition should be granted.

Date: February 9, 1984

Respectfully submitted,

Robert G. Levy
Berryl A. Speert
Allan P. Hillman
John M. Belferman
Frank, Bernstein, Conaway
and Goldman
1300 Mercantile Bank
& Trust Building
2 Hopkins Plaza
Baltimore, Md. 21201
(301) 625-3500

Attorneys for Petitioners

JOPN- 10

ATR-

APPENDIX A

BNA
Date Filed: 12-12-83
Date Received: 12-19

BNA FILE COPY

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 126—August Term, 1983

(Argued November 2, 1983 Decided December 12, 1983)

Docket No. 83-7364

CRIMPERS PROMOTIONS INC.,

Plaintiff-Appellee,

—against—

HOME BOX OFFICE, INC. and
SHOWTIME ENTERTAINMENT CORPORATION,

Defendants-Appellants.

Before:

FEINBERG, *Chief Judge,*
FRIENDLY and PRATT, *Circuit Judges.*

Appeal by defendants in an action under § 4 of the Clayton Act, by permission under 28 U.S.C. § 1292(b), from so much of an order of the District Court for the Southern District of New York, Leonard B. Sand, *Judge,*

554 F. Supp. 838 (1982), as denied defendants' motion to dismiss counts charging violations of §§ 1 and 2 of the Sherman Act on the ground that plaintiff lacked standing.

Affirmed.

ROBERT D. JOFFE, New York, New York (Cravath, Swaine & Moore, New York, New York), *for Defendant-Appellant Home Box Office, Inc.*

JOHN A. DONOVAN, New York, New York (Hughes Hubbard & Reed, New York, New York), *for Defendant-Appellant Showtime Entertainment Corporation.*

JERRY I. LEFKOWITZ, Forest Hills, NY, *for Plaintiff-Appellee.*

FRIENDLY, *Circuit Judge*:

The question on this appeal is whether a company organized to hold a trade show to facilitate contacts between producers of cable television programming and local cable television stations has standing to prosecute an action under § 4 of the Clayton Act against two companies which are alleged to dominate the business of purchasing and assembling programming from producers and selling it to the stations. Plaintiff claims that the defendants conspired to cause a boycott of its trade show

and to have used their monopoly power to assure the show's failure, in violation of §§ 1 and 2 of the Sherman Act. Judge Sand, in the District Court for the Southern District of New York, answered the question in the affirmative in a well-considered opinion, 554 F. Supp. 838 (1982), but certified his ruling for interlocutory appeal under 28 U.S.C. § 1292(b). We unhesitatingly affirm.

The Proceedings in the District Court

The principal allegations of the complaint here relevant are as follows:

Plaintiff Crimpers Promotions Inc. (Crimpers) was formed in 1980 for the initial purpose of producing a cable television trade show known as CATEL-EXPO-PROGRAMMING SOURCES '81 (CATEL) in Las Vegas during September, 1981. CATEL was to be "the first all programming, conference and exposition in the Cable Television Industry and was formed and produced in order to develop a national and international market place [sic] for Cable Television programming of all types and kinds." The show contained space for 350 booths and it was expected that 5000 or more persons would attend.

Defendant Home Box Office, Inc. (HBO) is the most widely available pay-television satellite network in the United States with approximately 8 million subscribers. It purchases programs from independent producers and also creates its own. It sends programs through a satellite to some 3,000 cable system operators affiliated with HBO, who in turn send them to the homes of various subscribers. In addition HBO provides direct services to subscribers in certain areas. Defendant Showtime Entertainment Corporation (Showtime) operates similarly, with some 2.5 million subscribers and 1,300 operators or affiliates.

The complaint goes on to allege that the defendants have become the dominant force in the cable pay-television industry and have unlawfully monopolized the market for programming to the industry.[1] Defendants have been able to offer the cable operators a "bundle" of programs which defendants have acquired from the producers and, being "the most powerful and influential sources through which programming may be sold" in the cable industry, have offered extremely low and unfair prices for programming to the independent companies that sell programming to them. The purpose of CATEL is to bring together in one trade show all suppliers of cable programming, both the independents and the networks, for "a truly comprehensive exposition and conference," with the further goal of creating "a diversity of information sources and access so that Cable System Operators would not be dependent upon the defendants whose vast Satellite Network Services dominate the Pay-TV business in Cable Television."

The complaint further alleges that defendants sent letters and made phone calls to independent programming and system operators to inform them that they shold not appear at CATEL. It quoted a representative of defendant Showtime as having told a person who he thought was an independent producer that Showtime would not participate in the show because the company believed it to

---

1 As Judge Sand observed, 554 F. Supp. at 841 n.2, a claim that the two defendants together attempted to or did monopolize the cable television industry, would be one of oligopoly under § 1 rather than of monopoly under § 2. *American Tel. & Tel. Co. v. Delta Communications Corp.*, 408 F. Supp. 1075, 1106 (S.D. Miss. 1976), *aff'd per curiam*, 579 F.2d 972 (5 Cir. 1978), *cert. denied*, 444 U.S. 926 (1979). However, he read the complaint as alleging attempted monopolization by each defendant separately as well as a conspiracy between them to restrain trade. Such a reading seems permissible; if not, any defect could readily be cured by amendment.

be a "rip-off"; this was because Showtime considered Crimpers to be an "opportunist" and because Showtime's policy was that it would not sell a particular piece of programming but only programming on a 24-hour a day basis. Defendants had informed independent programming suppliers and system operators that CATEL was a "rip-off" or scam and was a fraud on the public, and that none of the exhibitors would attend. Defendants also threatened that they would no longer purchase programming from those suppliers who attended the show. As a result only 55 companies were exhibitors, only 97 booths were occupied and less than 200 people appeared, in contrast to the 250, 350 and 5,000 that had been expected. As a result defendants had accomplished "their means of driving competitors from the market and of not permitting independent suppliers of stand-alone programming to be solidified into a unit which would attempt to challenge the monopoly created by the defendants." Defendants' illegal acts also forced Crimpers to cease business. The complaint proceeded to make further allegations in support of the claim of monopolization and sought treble damages and injunctive relief. Defendants moved under Fed. R. Civ. P. 12(b)(6) to dismiss the complaint, which also contained counts making a tying claim under § 1 of the Sherman Act and § 3 of the Clayton Act, and various state law claims. The judge denied the motion except for the tying claim and some of the state law claims.

With respect to the claims under §§ 1 and 2 of the Sherman Act, the judge began by explaining that the courts have grafted a doctrine of standing on the sweeping language of § 4 which confers a cause of action upon "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust

laws." He noted that this circuit had adopted the so-called "target-area" test, citing *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183 (1970), *cert. denied*, 401 U.S. 93 (1971), and *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (1971), *cert. denied*, 406 U.S. 930 (1972). He said that "[u]nder this test, the plaintiff must either be the 'direct target' of the antitrust violation or fall within the 'target area' of the alleged antitrust violation—that sector of the economy which is endangered by a breakdown of competitive conditions in the particular industry." 554 F. Supp. at 842. He noted defendants' argument that Crimpers did not directly compete with them in buying and selling cable programming; that their activities aimed only at such competitors; and that Crimpers was only incidentally harmed. After canvassing further elaborations of these arguments, the court found the case distinguishable from *Billy Baxter* and *Calderone* because defendants "took 'direct aim' at Crimpers and its trade show." *Id.* at 844.

Judge Sand then stated that whatever doubts he might have had with respect to plaintiff's standing under *Billy Baxter* and *Calderone* were dispelled by the Supreme Court's decision in *Blue Shield of Virginia v. McCready*, 102 S. Ct. 2540 (1982), discussed below, which he viewed as adding "significant gloss to the line of Second Circuit cases interpreting [the target area test's] application, and appears to signal a rather broader reading of the standing requirements under Section 4 of the Clayton Act." 554 F. Supp. at 845. He thought, correctly in our view, that "[a]t a minimum, it now seems clear that, as a rule, a plaintiff need not be a direct competitor in the market in which defendants operate," *id.*, since McCready was a consumer and the defendants were the Blue Shield of Virginia and the Neuropsychiatric Society of Virginia, Inc. Just as the

Blue Cross' refusal to honor McCready's bill for treatment by a psychologist was a means to defendants' objective to drive out psychologists in favor of psychiatrists, so the destruction of Crimpers' trade show, which was designed "to keep buyers and sellers of cable programming from transacting business face-to-face," was a means to eliminate competition by producers in dealing with television stations. *Id.* at 846. For these and other reasons discussed in his persuasive opinion, the judge found that Crimpers had standing under § 4 of the Clayton Act to bring its conspiracy and attempted monopolization claims under §§ 1 and 2 of the Sherman Act and denied defendants' motion to dismiss these. However, on motion by the defendants, he certified, under 28 U.S.C. § 1292(b), that his decision involved a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of this litigation, and another panel of this court granted leave to appeal.

DISCUSSION

Subsequent to the ruling below the Supreme Court handed down another decision under § 4 of the Clayton Act, *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 103 S. Ct. 897 (1983), in that instance denying standing. In their briefs to this court, defendants treat *Associated General* as having taken a narrower view of standing than *McCready*; they also repeat the distinctions of *McCready* and their reliance on *Billy Baxter* and *Calderone* which they had unsuccessfully asserted in the district court. We consider that Crimpers' case, rather than being distin-

guishable from McCready's in a sense favorable to the defendants, is stronger for the plaintiff, and that *Associated General* indicates no departure from *McCready* in any fashion pertinent to this case.

Defendants' battle plan, here as in the district court, is to argue first that plaintiff lacks standing under this court's target area test, and second to contend that *McCready* and *Associated General* endorsed this approach. This is not the proper method of analysis. With two recent elaborate Supreme Court opinions with respect to the scope of § 4 of the Clayton Act on the books, courts in this circuit should start their analysis of standing under § 4 with the Supreme Court opinions rather than engage in extensive parsing of *Billy Baxter* and *Calderone*.[2] The "target area" test embodied in those decisions was adopted over powerful dissents, has proved difficult to apply, and is received tepidly in the leading treatise, 2 Areeda & Turner, Antitrust Law § 334d, at 165-68 (1978). *See also* Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 Yale L.J. 809, 830 (1977) ("The target area approach is riddled with inconsistencies."). While the *McCready* opinion did not disapprove that formulation, it surely did not approve it, see 102 S. Ct. at 2548 n.14, and the *McCready* result is hard to square with it, since the "targets" in *McCready* were the psychologists, not their patients. The *Associated General* opinion likewise simply cited the "target area" test as one of many, 103 S. Ct. at 907 n.33, and, as will be developed later, advised the courts to abstain from black letter rules and to analyze the facts in each case. While we do not hold that *Calderone* or *Billy Baxter* have been

---

2 By the same token, we do not think it useful to discuss the multitude of decisions in other circuits prior to *McCready* and *Associated General*, none directly in point, which defendants have cited.

drained of their precedential vitality on their own or very similar facts, we think that in approaching new problems, courts of this circuit would do better, indeed are compelled, to follow the approaches adumbrated by the Supreme Court in *McCready* and *Associated General* without concern whether the results are consistent with language in earlier Second Circuit cases.

Justice Brennan's opinion for the Court in *McCready*, after an opening fanfare with respect to the broad scope of § 4 of the Clayton Act, the Court's refusal "to engraft artificial limitations on the § 4 remedy," and its application of the section "in accordance with its plain language and its broad remedial and deterrent objectives," 102 S. Ct. at 2545, recognized that "drawing on statutory policy, our cases have acknowledged two types of limitation on the availability of the § 4 remedy to particular classes of persons and for redress of particular forms of injury," *id.* at 2545-46.

The first of these consisted of limitations, manifested in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), designed to prevent double recovery. The Court perceived no such danger in *McCready*, where plaintiff's injury in being denied Blue Cross reimbursement was entirely different from the psychologists' loss of patients who did not display her fortitude in obtaining their services without Blue Cross reimbursement. We can see no danger of double recovery in recognizing Crimpers' standing. Crimpers' injury from having its trade show destroyed—the expenses incurred in preparing the show, the loss of reasonably anticipated profits from the show, perhaps even the loss of profits reasonably expected for the future—is distinct and different from the losses of producers in getting too little for their programs or of cable

television stations in paying too much.[3] To be sure the case is unlike *McCready* in that the defendants here may have to pay Crimpers as well as the producers and the stations if they were to file suit and ultimately prevail, whereas the *McCready* defendants needed only to pay the plaintiff and her class, the psychologists having suffered no damage since the plaintiffs had continued to use them. But this means simply that if defendants had injured only the producers and the stations, the damages would have been less than if, in the course of their allegedly unlawful conduct, they also injured a company like Crimpers which was endeavoring to facilitate direct dealings between the two. This is not the kind of "double recovery" which *Hawaii* and *Illinois Brick* sought to prevent.

Justice Brennan then turned to the second limitation, which he characterized as the "conceptually more difficult question" whether the injuries were "too remote" from the antitrust violation to afford standing. 102 S. Ct. at 2547. After analogizing the concept of remoteness to the "elusive" notion of proximate cause, he stated that courts should "look (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and, (2) more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under § 4." *Id.* at 2548.

---

3 While the complaint does not expressly allege the latter, defendants' brief concedes that the stations would have a cause of action under § 4 if defendants had restrained competition by the independent producers in selling directly to them, with attendant "increased distribution costs of purchasing 'packaged' programming from HBO and Showtime instead of buying programming directly from the producers on a 'stand-alone' basis". Brief for Appellants at 24-25. Any defect in alleging this could readily be cured by amendment.

Crimpers easily surmounts the first hurdle. The alleged violations were defendants' conspiring to interpose barriers against direct dealings between the producers and the stations and attempting to monopolize the business of furnishing programs. Crimpers got in the way and defendants allegedly made it suffer for trying to do so.

The second test is likewise satisfied. Defendants concede that their alleged activities were within the concern of Congress insofar as they adversely affected the producers or the stations. We see no reason why Congress, had it considered the matter, would not have been equally concerned with protecting a company like Crimpers which undertook to create a business that would have mitigated the precise injury, the limiting of dealings between producers and television stations to those conducted through HBO and Showtime, against which Congress meant to protect. Crimpers was not just a "supplier" of a competitor, to whom standing is generally denied, see 2 Areeda & Turner, *supra*, § 340(e), at 217. It was endeavoring to forge a link in a chain of the sale of programming, to wit, direct contact between program producers and cable television stations, that would compete with defendants in their role as middlemen. The injury to Crimpers was not a "remote" consequence of defendants' acts as would have been the case, for example, if the low prices allegedly paid by them had put a producer out of business and a supplier of the producer sued under § 4. In such cases the injury to the supplier is simply a consequence of the injury to the producer; Crimpers' case is more like (although stronger than) a boycott of a supplier intended to further the conspirators' restraint of trade and stifling of competition.

Injury to Crimpers was the precisely intended consequence of defendants' boycott; with respect to that act

the injury to Crimpers was even more "direct" than to the producers or stations who defendants concede would have standing. Just as McCready's injury "was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market," 102 S. Ct. at 2551, so Crimpers' injury was inextricably intertwined with the injury the defendants sought to inflict on producers and television stations in the cable television programming market. Under such circumstances, as Justice Brennan explained in *McCready, id.* at 2549, the principle of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1979), does not apply. Indeed, Crimpers' case is not only *a fortiori* to McCready's, since the defendants had Crimpers directly in mind, but *a multo fortiori* to the hypothetical put by Justice Brennan in a footnote:

> If a group of psychiatrists conspired to boycott a bank until the bank ceased making loans to psychologists, the bank would no doubt be able to recover the injuries suffered as a consequence of the psychiatrists' actions. And plainly, in evaluating the reasonableness under the antitrust laws of the psychiatrists' conduct, we would be concerned with its effects not only on the business of banking, but also on the business of the psychologists against whom that secondary boycott was directed.

102 S. Ct. 2551 n.21.[4]

[4] This hypothetical also answers defendants' argument, mentioned above, that *McCready* turned on the fact that, because of the willingness of McCready and her class to continue treatment by psychologists without Blue Cross reimbursement, the psychologists suffered no injury—in other words that antitrust defendants stand better where their boycott fails, than where it succeeds. Brief for Appellants at 41-42. Justice Brennan seems to have contemplated that the boycott in the hypothetical succeeded, i.e., the banks ceased making loans to

We see no basis for believing that the position taken in *McCready* was altered in *Associated General, supra,* 103 S. Ct. 897, decided after Judge Sand had rendered his opinion here. All the Justices who concurred in the majority opinion in *McCready* joined in *Associated General* except Justice Marshall, who would have upheld standing in the later case as well. Although Justice Stevens, the writer of *Associated General*, had filed a separate dissent in *McCready*,[5] he quoted from the *McCready* opinion, 103 S. Ct. at 907, followed it in analogizing the quest of federal judges for a workable interpretation of § 4 of the Clayton Act to "the struggle of common-law judges to articulate a precise definition of the concept of 'proximate cause,' " *id.* (footnote omitted), and plainly felt bound by its result, *id.* at 909.

Plaintiffs in *Associated General* were two unions (the Union) representing more than 50,000 individuals employed by the defendants in various phases of the construction business throughout California. The defendants were Associated General Contractors of California, Inc. (Associated), a membership corporation composed of some 250 members, and 1,000 unidentified co-conspirators. The Union and Associated were parties to collective bargaining agreements; some 3,000 contractors who were not members of Associated had entered into separate memorandum agreements binding themselves to the terms

---

psychologists with consequent injury both to the psychologists from loss of borrowing power and to the bank from loss of their business. Justice Rehnquist, dissenting, agreed that the bank in the hypothetical had standing, 102 S. Ct. at 2554 n.7, but predicated this on the impairment of its ability to compete with other banks, a basis which the majority evidently did not find convincing.

5 Insofar as the dissent rested on the ground that "[i]f respondent's antitrust claim is that petitioners have engaged in an unlawful boycott, it therefore is manifest that respondent is not the boycottee," 102 S. Ct. at 2556 n.5, it would be inapplicable here.

of the master collective bargaining agreements. Justice Stevens noted that "[t]he most specific allegations relate to the labor relations between the parties", *id.* at 900 (footnote omitted). He characterized "[t]he complaint's description of actions affecting nonparties" as "both brief and vague," *id.* These included encouraging non-members of Associated to enter into collective bargaining relationships with the Union; encouraging and indeed coercing, see *id.* at 901 n.3, owners of land and other letters of construction contracts to hire contractors and subcontractors who did not have collective bargaining agreements with plaintiffs; and encouraging and coercing, see *supra*, members and non-members of Associated and memorandum contractors to enter into agreements with subcontractors who had no collective bargaining agreements with the Union.

Justice Stevens began his discussion by observing that "the Union's most specific claims of injury involve matters that are not subject to review under the antitrust laws," *id.* at 902; and that this was also true with respect to the claim that defendants encourage non-members not to enter into collective bargaining relationships with the Union, *id.* at 903. This left only the allegations that defendants coerced landowners and others who let construction contracts and general contractors to divert business to non-union firms, with consequent loss of business to unionized firms. Recognizing that firms thus losing business might have antitrust claims, the Court then addressed the question whether the Union had such a claim, *id.* at 903-04. After an extensive review of the legislative history of § 7 of the Sherman Act (the predecessor of § 4 of the Clayton Act), the common law decisions antedating it, the early decisions thereunder, and the more recent course of decisions in the Supreme

Court and the lower courts, Justice Stevens concluded that "the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case," *id.* at 908 (footnote omitted), and adjured lower courts to "analyze each situation in light of the factors set forth in the text *infra*," *id.* n.33.

Justice Stevens conceded that "[t]he complaint does allege a causal connection between an antitrust violation and harm to the Union and further alleges that the defendants intended to cause that harm," *id.* at 908. However, "[a] number of other factors may be controlling", *id.*, and ultimately were found to dictate dismissal of the Union's claim.

The first of these was "the nature of the plaintiff's alleged injury." Here Justice Stevens relied on his discussion of the legislative history to support the conclusion that "the Sherman Act was enacted to assure customers the benefit of price competition", *id.*, and went on to state that "our prior cases", including *McCready*, "have emphasized the central interest in protecting the economic freedom of participants in the relevant market," *id.* at 909 (footnote omitted). Whereas McCready was a direct victim of defendants' conspiracy to restrain competition by psychologists with psychiatrists, the Union's harm resulted from defendants' efforts to thwart its objective of excluding non-union labor and this was a "labor-market" rather than an antitrust injury.[6] Here Crimpers claims to

[6] Emphasizing a statement made by Justice Stevens in distinguishing *McCready*, "[i]n this case, however, the Union was neither a consumer nor a competitor in the market in which trade was restrained," 103 S. Ct. at 909 (footnote omitted), defendants argue that any enlargement of the category of § 4 plaintiffs wrought by *McCready* was limited to consumers and that Crimpers was not a consumer. There are two answers: First, although McCready was a consumer, the opinion was not so limited, as witness the bank hypothetical in footnote 21 of the

be a victim of HBO's and Showtime's conspiracy to prevent direct dealing between producers and television stations by boycotting CATEL.

A second factor against recognition of the Union as a § 4 plaintiff was the indirectness of its injuries, these being only a result of the harm directly inflicted on unionized contractors and subcontractors and their employees, *id.* at 910-11 & nn. 46 and 47. Here, as in *McCready*, plaintiff's injury could hardly have been more "direct." It is true, as defendants argue, that direct dealing between producers and television stations would not necessarily take the form of patronizing Crimpers' trade show. But this would be a question of evidence and the amount of damages, particularly if Crimpers should assert damages for loss of future profits, not a basis for dismissal under Fed. R. Civ. P. 12(b)(6).

A third factor in rejecting the Union's claim was that

> [t]he existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party such as the Union to perform the office of a private attorney general.

103 S. Ct. at 911 (footnote omitted). Conceding that producers or television stations could sue for restraints illegally imposed on dealing between them, defendants urge this as a factor in their favor. Again there are a number of answers. First, Crimpers is not a "remote" party but was the immediate object of defendants' boycott. Second, despite their standing, the producers and

---

Court's opinion discussed above. Second, Crimpers was "a competitor in the market in which trade was restrained" in the sense that its trade show would have served to facilitate the direct dealing between producers and television stations which defendants sought to prevent.

stations would be hard put to establish just what damage they had suffered from inability to participate in Crimpers' show. Third, Crimpers *is* the most logical plaintiff to sue for the injury here alleged in the boycott of its trade show—as distinguished from the more general conspiracy to prevent direct dealings between producers and television stations.

A fourth factor militating against the Union's standing in *Associated General* was the speculative character of its damage claim, on which the Court elaborated. *Id.* at 911. As previously developed, Crimpers' damage claim is little more speculative than was McCready's. Its expenses in preparing CATEL are easily determinable, and its expected profits from this and future shows should be proveable under the liberal principles long recognized in antitrust cases. See *Eastman Kodak Co. v. Southern Photo Material Co.*, 273 U.S. 359, 379 (1927); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946); *Zenith Research Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969).

A final factor working against the Union's standing in *Associated General* was the difficulty in disentangling its damages from other damages resulting from defendant's conduct in order to avoid the danger of double recovery. 103 S. Ct. at 911-12. In our analysis of *McCready* we have demonstrated that no such problem exists here. Defendants argue further that a successful suit by the cable operators would deprive HBO and Showtime of any illegal fruits they might have gained from imposing increased distribution costs whereas Crimpers' damages are totally unrelated to such benefits. This misapprehends the function of a § 4 action which is to recompense a victim for his damages, not simply to strip a violator of his rewards.

In sum, despite the able presentation by defendants' counsel, we are unconvinced that the victim of a successful boycott designed to support a broad policy of market limitation lacks standing under § 4 simply because the boycottee was not a buyer or a seller but was endeavoring to provide a method whereby buyers and sellers could deal effectively with each other without paying tribute to the defendants. The contrary view would run counter not only to the two most recent decisions of the Supreme Court but to elementary common sense. Indeed, if we should free ourselves from the miasma of adjectives that has accumulated around the words of § 4, this case would seem to be a paradigm of standing.

Affirmed.

Office - Supreme Court, U.S.
FILED
JAN 4 1984
ALEXANDER L. STEVAS
CLERK

No. 83-914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MERICAN, INC.; MERICAN CURTIS, INC.; and MERICAN CURTIS, LTD.,
Petitioners,

v.

CATERPILLAR TRACTOR CO.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF IN OPPOSITION

DAVID C. MURCHISON
JOHN DEQ. BRIGGS, III
(Counsel of Record)
WILLIAM E. WALLACE, III
ALBERT C. LOEBE
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 783-0800
Attorneys for Respondent Caterpillar Tractor Co.

January 4, 1984

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

COUNTERSTATEMENT OF QUESTION PRESENTED

Did the Third Circuit (a) correctly conclude that the doctrines of *Illinois Brick* and "antitrust standing" are analytically distinct and (b) correctly apply the rule of *Illinois Brick* and its underlying principles to the facts of this case thus barring the damage claims of indirect purchasers alleging injury from the passing on to them of overcharges they claim were imposed upon their suppliers by the manufacturer?

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTION PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF CASE	1
A. Introduction and Summary	1
B. The Undisputed Facts	4
1. Distribution of Caterpillar Products	4
2. The Interterritorial Service Fee ("ISF")	5
3. Plaintiffs/Petitioners	6
4. Plaintiffs' Claims	9
C. The District Court's Ruling	9
D. The Third Circuit Decision	10
REASONS FOR DENYING THE WRIT	11
A. The Third Circuit Correctly Stated the Applicable Law as Set Forth by this Court's Decisions	11
B. The Third Circuit's Application of the Rule and Principles of *Illinois Brick* to the Facts of this Case Was Correct and Does Not Warrant Review by this Court	15
CONCLUSION	20

TABLE OF AUTHORITIES

CASES — Page

Associated General Contractors of California, Inc. v. California State Council of Carpenters, 103 S. Ct. 897 (1983) 11, 12, 13, 14, 16
Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982) 10, 11, 12, 13, 14, 15, 16
Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968) 3, 10, 14, 15, 17, 18, 19
Hawaii v. Standard Oil Co., 405 U.S. 251 (1972) .. 13, 15
Illinois v. Ampress Brick Co., 67 F.R.D. 461 (N.D. Ill. 1975), *rev'd*, 536 F.2d 1163 (7th Cir. 1976), *rev'd*, 431 U.S. 720 (1977) 14
Illinois v. Ampress Brick Co., 536 F.2d 1163 (7th Cir. 1976), *rev'd* 431 U.S. 720 (1977) 14
Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) ..... *passim*
In re Beef Industry Antitrust Litigation, 600 F.2d 1148 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980) 17
Merican, Inc. v. Caterpillar Tractor Co., 713 F.2d 958 (3d Cir. 1983) ..... *passim*
Stein v. United Artists Corp., 691 F.2d 885 (9th Cir. 1982) 17
Zinser v. Continental Grain Co., 660 F.2d 754 (10th Cir. 1981), *cert. denied*, 455 U.S. 941 (1982) 17

STATUTES

15 U.S.C. § 1 (1982) 2
15 U.S.C. § 15 (1982) 2
15 U.S.C. § 26 (1982) 2
28 U.S.C. § 1292(b) (1976) 3

RULES

Supreme Court Rule 17.1(c) 15
Supreme Court Rule 28.1 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-914

MERICAN, INC.; MERICAN CURTIS, INC.; and MERICAN CURTIS, LTD.,
Petitioners,

v.

CATERPILLAR TRACTOR CO.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Introduction and Summary

In this antitrust case, respondent Caterpillar Tractor Co.[1] ("Caterpillar") was sued by three indirect pur-

[1] In accordance with Rule 28.1 of this Court, the following entities are subsidiaries or affiliates of Caterpillar that are not wholly-owned: Turbinas Solar do Brasil Ltda.; Turbotronic Controls Corporation; P.T. Natra Raya; Health Plan of Central Illinois, Inc.; S.A. Fonderies et Acieries de Paris Seine; Caterpillar Mitsubishi Ltd.; Tractor Engineers Ltd.; Conek S.A. de C.V.; Turbinas Solar S.A. de C.V.; and Equipment Financing Associates.

chasers of Caterpillar electric generator sets seeking treble damages under section 4 of the Clayton Act, 15 U.S.C. § 15, for an alleged violation of section 1 of the Sherman Act, 15 U.S.C. § 1.[2] The plaintiffs (petitioners here) purchased Caterpillar electric generator sets not from Caterpillar, but from various independent authorized Caterpillar dealers at a price determined individually and unilaterally by each dealer. Plaintiffs then resold the generator sets to other distributors and retail resellers in the Middle East who sold the sets to the users.[3]

Plaintiffs allege their injury occurred when Caterpillar, under the terms of its distribution agreements with authorized dealers, ceased permitting the dealers to retain the five percent warranty service fee ("interterritorial service fee" or "ISF") on their sales of Caterpillar products that received their "initial substantial use" outside the selling dealer's service territory, since the selling dealer had no warranty service obligation as to these sales and thus did not earn any right to the service fee. Plaintiffs allege that the warranty service provisions of Caterpillar's distribution agreements impose an illegal "overcharge" on the selling Caterpillar dealers. Plaintiffs' claim of injury and damages is based on their contention that the selling Caterpillar dealers passed on to them some portion of this allegedly illegal overcharge in the form of higher prices.

Caterpillar moved to dismiss or for summary judgment on plaintiffs' damages claim on the ground that, even if plaintiffs could prove the allegations of their amended complaint, they were not "persons injured" by the alleged antitrust violation within the meaning of sec-

---

[2] Plaintiffs also sought injunctive relief under section 16 of the Clayton Act, 15 U.S.C. § 26. The validity of this claim has not been ruled on by the courts below.

[3] *See* chart *infra* at p. 8.

tion 4 of the Clayton Act under the rules of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) and *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). Plaintiffs did not dispute that they were indirect purchasers of Caterpillar products whose only claim of economic injury arose when and if a direct-purchasing Caterpillar dealer decided to pass on to them some portion of the allegedly illegal overcharge Caterpillar is claimed to have imposed upon its dealers. Plaintiffs instead argued that because they were within the "target area" of the alleged illegal restraint (and hence had "standing") the rule of *Illinois Brick* and *Hanover Shoe* was inapplicable. The District Court essentially adopted petitioners' argument and denied Caterpillar's motion, but certified an immediate appeal pursuant to 28 U.S.C. § 1292(b).

The Third Circuit reversed. *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958 (3d Cir. 1983) (Pet. App. A).[4] The Court of Appeals first recognized that the limitation on the treble damage remedy articulated by this Court in *Illinois Brick* and *Hanover Shoe* is analytically distinct from the concept of "antitrust standing" on which plaintiffs relied. The Court then analyzed the facts alleged in plaintiffs' amended complaint[5] in light of the principles underlying this Court's *Illinois Brick* decision and concluded that plaintiffs' damages claims were barred under *Illinois Brick*. 713 F.2d at 966-69 (Pet. App. A at 15-23). Plaintiffs have petitioned this Court for a writ of certiorari to review the application of *Illinois Brick* to the factual circumstances of this case. (Pet. at 13.)

---

[4] The Third Circuit's Slip Opinion is reprinted in plaintiffs' Petition to this Court at Appendix A, cited herein as "Pet. App. A at ——."

[5] The Court properly assumed plaintiffs could prove the facts they alleged. 713 F.2d at 965, 966 n.18 (Pet. App. A at 14).

B. The Undisputed Facts [6]

1. *Distribution of Caterpillar Products*

While Caterpillar's principal products are heavy earth-moving equipment and construction machinery, this case involves only electric generator sets,[7] which the company also designs, manufactures, and markets. (App. 8B-9B). Caterpillar distributes its products, including electric generator sets, through a worldwide network of authorized dealers who function generally as retail sellers of Caterpillar products. (App. 9B.) Each dealer is an independently owned and operated business that has entered into a Distribution Agreement with Caterpillar. (App. 9B, 32C.)

The Distribution Agreement provides, among other things, for the promotion, distribution, installation and servicing of Caterpillar-manufactured products by the dealers. (*Id.*) The Agreement also identifies for each dealer an area of service responsibility in which the dealer agrees to maintain one or more suitable places of business; maintain adequate service facilities; employ trained salesmen to market Caterpillar products; and employ trained technicans to render prompt, competent, diagnostic and mechanical service to users of Caterpillar products. (App. 33C-36C.) Most importantly for pur-

---

[6] Citations in this brief to the supporting record refer to the parties' Joint Appendix to the Third Circuit, cited "App. ——."

Caterpillar is constrained to point out that the statement of "facts" set forth in plaintiffs' petition, particularly at pp. 4-12, contains numerous mischaracterizations of various documents in an apparent effort to show that plaintiffs were the "target victims" of an alleged conspiracy. While Caterpillar need not contest this point for present purposes, Caterpillar has vigorously denied that any conspiracy existed, or that its distribution agreements with its authorized dealers are in any way contrary to the antitrust laws.

[7] An electric generator set typically consists of a diesel engine, a generator, a battery, a governor and transfer switches. It is used mainly to provide "prime" power to buildings and clusters of buildings without access to central power sources and to provide "standby" power to hospitals, schools or other buildings.

poses of this litigation, each dealer also agrees to provide—free of charge to the user—delivery, inspection, and warranty services with respect to all Caterpillar products that receive their "initial substantial use" in that dealer's service territory, regardless of when, where, or by whom the products were sold. (App. 34C.)

On its part, Caterpillar agrees to sell its products, including generator sets, to its dealers at a maximum discount of twenty-five percent off the published Caterpillar list price. (App. 58C-60C.) Of the twenty-five percent discount, five percent is allocated by Caterpillar as reasonable compensation for each dealer's undertaking the responsibility of providing free delivery, inspection, and warranty services on products that receive their "initial substantial use" in that dealer's service territory. (App. 43C-44C, 63C, 135E-36E.)

2. *The Interterritorial Service Fee ("ISF")*

If a dealer sells a generator set that receives its initial substantial use in the dealer's own service territory, he (the "selling dealer") is responsible for providing delivery, inspection, and warranty services free of charge to the user. (App. 33C-36C, 43C-44C, 63C-65C, 135E-36E.) In that situation, the selling dealer is entitled to receive the full twenty-five percent discount, including the five percent allocated as compensation for assuming the responsibility of providing those services. (*Id.*) If, however, a selling dealer sells a generator set that receives its initial substantial use in the service territory of a second dealer ("servicing dealer"), the selling dealer is not obligated to provide delivery, inspection, and warranty services and thus is not entitled or permitted to keep the five percent discount originally allowed by Caterpillar as compensation for assuming those obligations. (*Id.*) Under the Distribution Agreement, as soon as it becomes known that a generator set sold by one dealer will receive its initial substantial use in another dealer's service

territory, the selling dealer is required to return to Caterpillar the five percent portion of the twenty-five percent trade discount allocated for delivery, inspection, and warranty service obligations. (*Id.*) Likewise, the Distribution Agreement obligates Caterpillar to pay the five percent ISF to the servicing dealer upon the filing of an appropriate claim. (*Id.*)

Since July 1978, Caterpillar has insisted that each of its dealers comply with the contractual provisions of the Distribution Agreement requiring payment of ISFs to Caterpillar as soon as it becomes known to the selling dealer that the generator set will receive its initial substantial use in a second dealer's service territory. (App. 15B-16B.) In addition, Caterpillar notified its dealers in February 1980, that it had discontinued its past practice of returning to the selling dealer any warranty service fees not ultimately earned by the dealer with service responsibility. (App. 135E-36E.) These changes in Caterpillar's administration of ISFs applied to all Caterpillar products (not just electric generator sets) and to all Caterpillar dealers. (*Id.*)

3. *Plaintiffs/Petitioners*

Plaintiffs Merican, Inc., Merican Curtis, Inc., and Merican Curtis, Ltd., along with several other affiliated companies, are general "trading" companies, formed during the mid-1970's, engaged in buying and reselling a wide range of products, including detergents, cosmetics, canned vegetables, and dairy products, as well as Caterpillar electric generator sets. (App. 137E, 156E-57E.) No plaintiff manufactures electric generator sets and no plaintiff has ever entered into a Distribution Agreement or any other agreement with Caterpillar. (App. 127E-28E.) Thus, no plaintiff has ever paid Caterpillar an ISF and no plaintiff has ever been obligated to do so. (*Id.*) Indeed, insofar as is pertinent here, no plaintiff has pur-

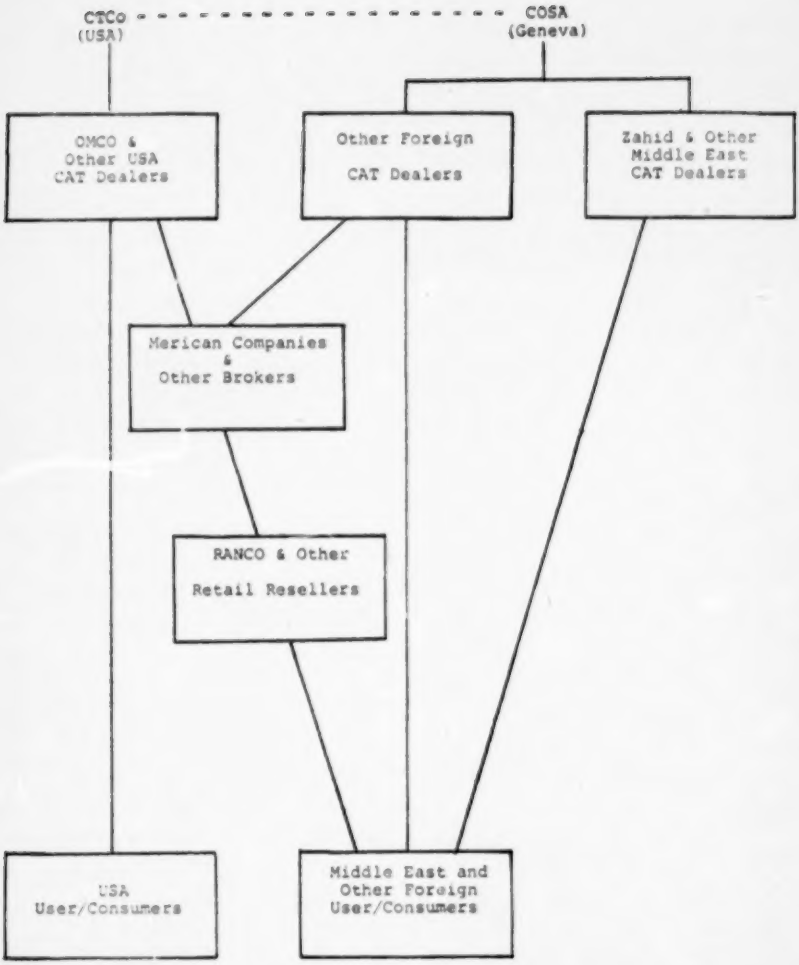
chased any products from Caterpillar, or had any business dealings with it. (App. 138E-43E.)

Plaintiffs did purchase Caterpillar-manufactured generator sets from various independent Caterpillar dealers, including principally Ohio Machinery Co. ("OMCO") a dealer located in Cleveland, Ohio. (App. 11B-12B, 261G-62G.) In each year from 1978 through 1981, plaintiffs purchased an increasingly greater number of electric generator sets from OMCO.[8] (App. 261G) In the fall of 1981, when plaintiffs' business was still strong, they left the business of brokering Caterpillar electric generator sets by selling to their principal supplier OMCO their entire relationship with their principal customer Rabiah & Nassar Co. ("RANCO") a retail-level reseller in Saudi Arabia who, plaintiffs allege, competed for sales with Zahid, Caterpillar's authorized Saudi Arabian dealer. (Pet. at 11; App. 14B, 111E-12E, 265G.) A chart depicting the distribution channels through which Caterpillar electric generator sets reach ultimate users in the Middle East and elsewhere is set forth below.[9]

---

[8] As plaintiffs complain of restraints that allegedly began in 1978 and 1980, it is noteworthy (and undisputed) that plaintiffs' unit sales actually increased an average of 130 percent in *each* year between 1977 and 1981, reaching an all-time high in 1981, long *after* the imposition of the alleged restraint, and more than 650 percent higher than their 1977 pre-"restraint" sales. *See* App. 79D, 261G.

[9] The chart is based on undisputed facts. Caterpillar-manufactured generator sets are sold by Caterpillar ("CTCo.") to authorized dealers in the U.S., such as OMCO, or by Caterpillar's Swiss subsidiary, Caterpillar Overseas, S.A. ("COSA") to authorized foreign dealers in Europe, Africa, or the Middle East (such as Zahid). In the normal course, the authorized dealers sell generator sets directly to user/consumers. At times, middlemen/brokers, such as the Merican plaintiffs, are able to buy profitably from a dealer located in one part of the world for resale to other broker/dealers or user/consumers in another part of the world. The plaintiffs here resold sets purchased in the U.S. and elsewhere to retail-level dealers such as RANCO located in the Middle East, who ultimately sold to users.


CTCo
(USA)
COSA
(Geneva)
OMCO &
Other USA
CAT Dealers
Other Foreign
CAT Dealers
Zahid & Other
Middle East
CAT Dealers
Merican Companies
&
Other Brokers
RANCO & Other
Retail Resellers
USA
User/Consumers
Middle East and
Other Foreign
User/Consumers
key
COSA-Caterpillar Overseas, S.A.
CTCo-Caterpillar Tractor Co.
Merican -Merican Curtis Ltd.
Companies -Merican Curtis, Inc.
-Merican Inc.
OMCO-Ohio Machinery Co.
RANCO-Rabiah & Nasser Co.
Zahid-Zahid Tractor Co.

4. *Plaintiffs' Claims*

Petitioners claim that Caterpillar's five percent ISF, which is applied only to authorized Caterpillar dealers who do not in fact assume any obligations to provide warranty or delivery service on products they sell, is an unlawful overcharge that constitutes an "unvarnished penalty" on those dealers.[10] They further allege that Caterpillar's method of administering the ISF since 1978, and especially since 1980, was the product of a conspiracy between Caterpillar and its authorized Saudi dealer, Zahid, the object of which allegedly was to prevent RANCO (plaintiffs' main Saudi customer) from competing with Zahid. (App. 9B-18B) The essence of their claim is that, pursuant to the alleged conspiracy with Zahid, Caterpillar imposed the five percent ISF on all its authorized dealers. (App. 16B-19B.) Petitioners' own injury, they claim, arises from the fact that OMCO and other Caterpillar dealers passed on to them all or part of the five percent ISF (*id.*), thereby reducing their profit margins. (App. 16B-17B, 20B.)

C. The District Court's Ruling

On these and other undisputed facts, Caterpillar moved in the district court to dismiss plaintiffs' claims for money damages under the rule of *Illinois Brick*. Caterpillar's motion was in no way based upon the analytically distinct principles of antitrust standing. Indeed, for purposes of its motion, Caterpillar assumed that plaintiffs had "antitrust standing." Nevertheless, plaintiffs argued that *Illinois Brick* could not apply to bar their suit because they had "antitrust standing" insofar as they were arguably within the area of the economy threatened by any breakdown of competitive conditions, and they were among the "targets" of the alleged conspiracy. (App. 429I-31I.)

---

[10] Answers of Merican Inc., *et al.*, to Defendant's First Set of Interrogatories at 164.

Despite the undisputed fact that plaintiffs were indirect purchasers making claims based solely on the pass-on of an allegedly unlawful overcharge through the chain of distribution, the district court did not apply the rule of *Illinois Brick*. The district court ruled that this Court's then-recent decision in *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), somehow operated as a limitation on *Illinois Brick*. According to the district court, since plaintiffs had "standing" under the Third Circuit's "target area" test, this Court's holdings in *Illinois Brick* and *Hanover Shoe* could not bar plaintiffs' claims.

D. The Third Circuit Decision

The Third Circuit reversed. *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958 (3d Cir. 1983) (Pet. App. A). Both the majority and dissenting opinions recognized

> that the district court misconstrued the inquiry to be conducted under the rule of *Illinois Brick*. The issue is not whether Appellees have sustained injuries too remote to give them standing or whether they are the direct targets of an alleged conspiracy, but whether they are in the class of persons considered to be injured in their business or property under section 4 [of the Clayton Act] by an antitrust violation.

713 F.2d at 966 (Pet. App. A at 15); *see also id.* at 970 (Pet. App. A at 23). After an exhaustive analysis of the facts alleged by plaintiffs and the applicable decisions of this Court, the Court of Appeals concluded:

> [B]ased on facts alleged in their complaint, Appellees are barred from seeking treble damages under section 4 of the Clayton Act by operation of the rule of *Illinois Brick*. The possibility of duplicative recovery if the direct purchaser brings suit and the potential for complex apportionment of damages lead us to conclude that Appellees are not persons injured

> in their business or property by reason of a violation of the antitrust laws within the meaning of section 4.

713 F.2d at 969 (Pet. App. A at 22).

REASONS FOR DENYING THE WRIT

The Third Circuit's decision conflicts with no decision of this Court and with no decision of any other circuit; it presents no question warranting review. The Third Circuit correctly held, in accordance with all applicable decisions of this Court, that *Illinois Brick* involves issues that are analytically distinct from those involved in determining antitrust standing. The Third Circuit also correctly applied the rule of *Illinois Brick* in concluding that, on the facts of this case, these indirect purchasing plaintiffs claiming damages by virtue of a passed-on overcharge are precluded from pursuing treble damage claims because the risk of duplicative recovery is clearly present and also because of the complex problem of apportionment of damages.

Rather than presenting "important questions of antitrust law" as plaintiffs contend (Pet. at 14), this case involves a straightforward application of settled principles to the particular facts of this case. It reflects the Third Circuit's careful "exercise of judgment in deciding whether the law affords a remedy in [these] specific circumstances." 713 F.2d at 965 (Pet. App. A at 13) (quoting *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 103 S. Ct. 897, 908 (1983)). Certiorari is unwarranted, and the petition should be denied.

A. The Third Circuit Correctly Stated the Applicable Law as Set Forth by This Court's Decisions

Petitioners assert that the Third Circuit's opinion "cannot be reconciled" with this Court's decisions in *Blue Shield* and *Associated General Contractors* (Pet. at 17, 23), but they never explain how the Third Circuit devi-

ated from those decisions, which involved only the question of antitrust standing and not the applicability of *Illinois Brick* to indirect purchasers attempting to assert pass-on damage claims.[11] Instead, petitioners argue once again that their alleged status as "targets" of the claimed restraint provides them with antitrust standing and somehow exempts them from the clearly applicable rule of *Illinois Brick*. (Pet. at 17-27.) At most, plaintiffs' argument concerning *Blue Shield* and *Associated General Contractors* addresses a point that is not at issue here and that Caterpillar has not contested—namely, that a plaintiff who is not attempting to make offensive use of a pass-on theory may be accorded standing to maintain suit under section 4 by making a sufficiently direct claim for damages as an antitrust "target victim." The Third Circuit did not rule that plaintiffs cannot maintain this suit because they lack standing.

---

[11] While this Court in *Blue Shield* discussed the policies underlying *Illinois Brick* as they might bear on the issue of standing, there was no issue of *Illinois Brick*'s direct applicability, since the plaintiff subscriber was a direct purchaser who was not complaining that some entity between her and the insurance company had passed on to her an unlawful overcharge. Indeed, the only question presented in *Blue Shield* was whether the subscriber was too remote from the alleged violation to be accorded standing. 457 U.S. at 465, 476.

In *Associated General Contractors*, the issue was whether a union claiming to be the intended victim of a contractors' conspiracy to coerce third parties to enter non-union contracts had standing to maintain a suit under § 4 of the Clayton Act. Again, the Court discussed the policies underlying *Illinois Brick* as they relate to the issue of standing. However, the union in *Associated General Contractors* was not claiming damages by virtue of an allegedly passed-on overcharge so as to implicate the rule of *Illinois Brick*. Indeed, in holding that a plaintiff's bald assertion of "target victim" status is insufficient even to provide standing, *Associated General Contractors* fully supports the conclusion of the Third Circuit that such an assertion is insufficient to exempt these plaintiffs from the rule of *Illinois Brick*. *See Associated General Contractors*, 103 S. Ct. at 908 n.37, 913.

Nor did the Third Circuit fail to consider the extent to which *Blue Shield* and *Associated General Contractors* bear on the policies underlying *Illinois Brick*. Rather, the Third Circuit carefully analyzed these cases, as well as the holding and policies of *Illinois Brick* itself, in concluding that "standing" and the rule of *Illinois Brick* are analytically distinct concepts that limit the section 4 remedy in different ways. 713 F.2d at 963-65, 966 n.19 (Pet. App. A at 8-15). "Standing" is akin to "proximate cause." Determining standing involves inquiry into "whether a particular injury is too far removed from an alleged violation to warrant a section 4 remedy." 713 F.2d at 964 (Pet. App. A at 11) (footnote omitted). To make this determination, a court must analyze the specific factual situation in light of "the causal connection between an antitrust violation and the injured party, the nature of the plaintiff's alleged injury, and the directness or indirectness of the asserted injury." 713 F.2d at 964-65 (Pet. App. A at 12) (footnotes omitted) (citing *Associated General Contractors*, 103 S.Ct. at 907-13 and *Blue Shield*, 457 U.S. at 478.)[12]

The rule drawn from *Illinois Brick* and *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), on the other hand, recognizes "that there are certain classes of plaintiffs who, although able to trace an injury to an antitrust violation, are generally not within the group of 'private attorneys general' Congress created to enforce the antitrust laws under section 4." 713 F.2d at 963 (Pet. App. A at 9-10); *accord*, *Blue Shield*, 457 U.S. at 473-75.

---

[12] The Third Circuit also noted, correctly, that analysis of the directness or indirectness of the asserted injury for purposes of standing implicates many of the concerns identified in *Illinois Brick*, such as the existence of other classes of persons potentially motivated to redress an alleged violation, the speculative nature of damages resulting from indirect effects of an alleged violation, and the danger of complex apportionment of damages. 713 F.2d at 965 n.15 (Pet. App. A at 12) (citing *Associated General Contractors*, 103 S. Ct. at 910-12).

Analysis under this limitation must focus on the policies this Court articulated in *Illinois Brick*:

> First, it "focused on the risk of duplicative recovery engendered by allowing every person along a chain of distribution to claim damages arising from a single transaction that violated the antitrust laws." *Blue Shield*, [457 U.S. at 474-75,] 102 S. Ct. at 2546. Second, it sought to avoid burdening § 4 actions with damages issues giving rise to the need for 'massive evidence and complicated theories'. . . . . *Id.* at n.11.

713 F.2d at 963-64 (Pet. App. A at 10) (footnote omitted). The Third Circuit accordingly held, as has every other court to have considered the question, that where a plaintiff seeks damages based on a pass-on theory, he may be barred by *Illinois Brick* from maintaining a suit for money damages under the antitrust laws.

This conclusion was mandated by *Illinois Brick* itself and is entirely consistent with *Blue Shield* and *Associated General Contractors*. In *Illinois Brick*, the district court dismissed the complaint on the ground that the injuries of the indirect-purchaser plaintiffs were too remote to give them standing to sue. *Illinois v. Ampress Brick Co.*, 67 F.R.D. 461, 468 (N.D. Ill. 1975). On appeal, the Seventh Circuit also analyzed the case as turning on the standing issue, but ruled, as plaintiffs urge here, that the indirect purchasers were entitled to sue for pass-on damages because they were within the "target area" of the antitrust violation alleged. *Illinois v. Ampress Brick Co.*, 536 F.2d 1163, 1167 (7th Cir. 1976). This Court reversed, holding, on the basis of *Hanover Shoe*'s rule that direct purchasers are injured to the full extent of the overcharge, that the indirect purchaser plaintiffs were not "persons injured" within the meaning of section 4, and thus were not within the group of private attorneys general created by Congress to redress alleged antitrust violations. *Illinois Brick*, 431 U.S. at 746. In so holding,

this Court made absolutely clear that its ruling did not depend on whether the plaintiffs had "standing":

> Because we find *Hanover Shoe* dispositive here, we do not address the standing issue, except to note, as did the Court of Appeals below, 536 F.2d, at 1166, that the question of which persons have been injured by an illegal overcharge for purposes of § 4 is analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue for damages under § 4.

431 U.S. at 728 n.7. This Court expressly reaffirmed in *Blue Shield* that standing is "[a]nalytically distinct from the restrictions on the § 4 remedy recognized in *Hawaii* and *Illinois Brick*." 457 U.S. at 476.

The Third Circuit's conclusion was inescapable that the district court erred in making only an analysis of plaintiffs' standing, rather than applying the analytically distinct analysis required under *Illinois Brick*. 713 F.2d at 966, 970 (Pet. App. A at 14-15, 23). Plaintiffs' assertion in their petition notwithstanding, the Third Circuit's statement of the applicable law is entirely consistent with this Court's decisions, and it affords no basis for review by certiorari.

B. The Third Circuit's Application of the Rule and Principles of *Illinois Brick* to the Facts of this Case Was Correct and Does Not Warrant Review by this Court

Petitioners also seek to have this Court review the application of *Illinois Brick* to the facts of this case, claiming that "the Court of Appeals misapplied *Illinois Brick*." (Pet. at 14.) Certiorari is unwarranted, however, because the application of *Illinois Brick* here is strictly limited to the instant facts, and does not provide a rule of general application or an important question of law meriting this Court's review. *See* Supreme Court Rule 17.1(c). More importantly, the Third Circuit's application of *Illinois Brick* here is clearly correct and in

complete accord with the holding and principles of *Illinois Brick* and *Hanover Shoe*.

In applying *Illinois Brick* to bar plaintiffs' damage claims, the Third Circuit was guided by this Court's teaching that limitations on the section 4 remedy are not hard and fast rules, but rather are principles "that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances." 713 F.2d at 965 (Pet. App. A at 13) (quoting *Associated General Contractors*, 103 S.Ct. at 908); *see also Blue Shield*, 457 U.S. at 472. Accordingly, the Third Circuit was careful to confine its analysis, and limit its holding, to the specific facts of this case:

> We hold that, based on facts alleged in their complaint, Appellees are barred from seeking treble damages under section 4 of the Clayton Act. . . . Our analysis is tempered by our recognition that the antitrust laws are written broadly to ensure rigorous enforcement of congressional policy. On the facts of this case, however, we find that the policies underlying *Illinois Brick* preclude Appellees from maintaining suit.

713 F.2d at 969 (Pet. App. A at 22-23). This limited decision is not only wholly proper, but inescapable, on the facts of this case.

First, it is undisputed that plaintiffs are indirect purchasers. They did not purchase Caterpillar products from Caterpillar at prices set by Caterpillar; they purchased from independent Caterpillar dealers at prices determined by each dealer.[13]

Second, plaintiffs are plainly attempting to assert a pass-on theory of injury and damages. Their only claim of economic injury is that they paid higher prices for Caterpillar electric generator sets after Caterpillar ceased al-

[13] It is undisputed that the prices plaintiffs paid were independently negotiated on a transaction-by-transaction basis. (App. 111E.)

lowing its dealers to retain warranty service fees that were not earned by those dealers. According to plaintiffs, the dealers took into account the allegedly illegal overcharge imposed on them by Caterpillar when they decided how much to charge plaintiffs for generator sets. (App. 129E.) Under plaintiffs' theory, they would suffer no injury from Caterpillar's allegedly illegal overcharge unless an independent Caterpillar dealer decided to pass on some portion of the ISF to plaintiffs.

Although these facts alone are sufficient to bring plaintiffs' claims within the proscription of *Illinois Brick*, the Third Circuit went further and analyzed the facts of this case in light of the principles and policies underlying the *Illinois Brick* rule.[14] The analysis confirms that plaintiffs are properly barred from seeking treble damages under section 4.

---

[14] Initially, the Third Circuit rejected petitioners' argument that the rule of *Illinois Brick* did not apply to vertical restraints, but instead applied only to horizontal restraints. 713 F.2d 967-68 (Pet. App. A at 17-19). The Third Circuit recognized that *Hanover Shoe*, which spawned the *Illinois Brick* decision, was itself a vertical restraint case charging monopolization, not horizontal price-fixing. Thus, the Third Circuit held, as has every other court of appeals that has addressed the issue, that the applicability of *Illinois Brick* depends not on a plaintiff's characterization of the illegal activity as being horizontal or vertical, but rather on whether allowing assertion of the pass-on theory could create the possibility of duplicative and overly complex damage claims that this Court refused to allow in *Illinois Brick*. 713 F.2d at 967-68 (Pet. App. A at 18-19). *Accord, Stein v. United Artists Corp.*, 691 F.2d 885, 895 (9th Cir. 1982); *Zinser v. Continental Grain Co.*, 660 F.2d 754, 760-61 (10th Cir. 1981), *cert. denied*, 455 U.S. 941 (1982); *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1157 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980).

In this case plaintiffs have used a number of labels to characterize their claim, which they have variously described as "horizontal," "vertical" and "a boycott." *See* Brief of Appellee to the Third Circuit at 4-6. The labels affect neither the fundamental pass-on nature of plaintiffs' claims nor the policy reasons for barring their suit under *Illinois Brick*.

As the Third Circuit recognized, the possibility for duplicative recovery is clearly present in this case. 713 F.2d at 968-69 (Pet. App. A. at 19-21). If, as plaintiffs contend, the ISF amounts to an illegal "penalty" or "overcharge," then Caterpillar's authorized dealers, including plaintiffs' main supplier OMCO, have a claim for damages based on purchases of goods subject to the ISF "overcharge." Under *Illinois Brick* and *Hanover Shoe*, if OMCO were to sue Caterpillar alleging that it was overcharged by virtue of the unlawful "penalty" alleged in plaintiffs' complaint, Caterpillar would not be permitted to show that OMCO passed on any such "penalty" to its customers, such as plaintiffs. *Illinois Brick*, 431 U.S. at 746-47; *Hanover Shoe*, 392 U.S. at 487-94. Thus, were plaintiffs allowed to evade *Illinois Brick* by asserting the passing-on theory offensively, Caterpillar would face the substantial likelihood of duplicative recoveries and potentially inconsistent adjudications.[15] Moreover, if plaintiffs were allowed to evade *Illinois Brick* there would be no reason why other downstream purchasers in the chain of distribution, such as RANCO, RANCO's customers, and others similarly situated could not also assert treble damage claims arising from the very same transactions as plaintiffs. All such purchasers could assert the same basic claim that, but for the pass-on of the ISF, they might have paid lower prices. The Third Circuit recognized that such a result is what this Court

---

[15] Petitioners assert that an affidavit submitted by OMCO's president in connection with a jurisdictional issue shows that OMCO's chance of successfully suing Caterpillar is "infinitesimal." (Pet. at 22.) Apart from the fact that petitioners mischaracterize and draw unwarranted conclusions from the OMCO affidavit (which was submitted to show that the alleged "restraint" had had no anticompetitive effect on U.S. or foreign commerce), this Court has made it clear that the application of *Illinois Brick* to bar an indirect purchaser's pass-on suit does not depend on the likelihood that the direct purchaser will sue, but rather on the policy determination that direct purchasers are more appropriate enforcers of the antitrust laws. *Illinois Brick*, 431 U.S. at 746.

sought to avoid through application of the *Illinois Brick* rule. 713 F.2d at 969.

The Third Circuit also noted that the facts of this case implicate the second policy concern underlying *Illinois Brick*—avoidance of "massive evidence and complicated theories" in adjudicating the damages claims of passing-on plaintiffs. *See Illinois Brick*, 431 U.S. at 741; *Hanover Shoe*, 392 U.S. at 493. Here, to prove any damages resulting from the ISF, plaintiffs would have to

> calculate the service fee on each generator set purchased by OMCO, determine how the imposition of the fee and market forces affected the price paid by [plaintiffs], and finally estimate how any increased price affected [plaintiffs'] profits and sales in light of competitive market forces in Saudi Arabia.

713 F.2d 969 (Pet. App. A at 22) (footnote omitted). The court of appeals also recognized that an inquiry into consequential damages allegedly resulting from the ISF, such as plaintiffs' claim for lost profits, would necessarily implicate the same overly complex tracing of the claimed overcharge through the various levels of distribution. *Id.* Only through such an analysis could the ISF be shown to have effected the loss plaintiffs allegedly suffered, as distinguished from the effects of general economic recession, consumer preference, or plaintiffs' own marketing ineptitude. The Third Circuit correctly concluded that the policies stated in *Illinois Brick* foreclosed such a complex, hypothetical damages analysis. *Id.*

Since the Third Circuit correctly applied *Illinois Brick* to the facts of this case, certiorari is not warranted.[16]

---

[16] The brief filed on behalf of the amici adds nothing. To the extent that brief addresses the law, it fails to show any variance between the decision below and any decision of this or any other court. To the extent the amici address facts, the facts are seriously misdescribed—perhaps not surprising given amici's lack of access to the record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID C. MURCHISON
JOHN DEQ. BRIGGS, III
(Counsel of Record)
WILLIAM E. WALLACE, III
ALBERT C. LOEBE
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 783-0800
Attorneys for Respondent
Caterpillar Tractor Co.

January 4, 1984

Office - Supreme Court, U.S.
FILED
FEB 15 1984
ALEXANDER L. STEVAS
CLERK

No. 83-914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MERICAN, INC.; MERICAN CURTIS, INC.; and MERICAN CURTIS, LTD.,
Petitioners,

v.

CATERPILLAR TRACTOR CO.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

RESPONSE TO PETITIONERS' SUPPLEMENTAL BRIEF

DAVID C. MURCHISON
JOHN DEQ. BRIGGS, III
(Counsel of Record)
WILLIAM E. WALLACE, III
ALBERT C. LOEBE
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 783-0800
Attorneys for Respondent Caterpillar Tractor Co.

February 15, 1984

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-914

MERICAN, INC.; MERICAN CURTIS, INC.; and MERICAN CURTIS, LTD.,
Petitioners,

v.

CATERPILLAR TRACTOR CO.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

RESPONSE TO PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners, Merican, Inc., Merican Curtis, Inc., and Merican Curtis, Ltd. (collectively "Merican") have filed a Supplemental Brief in support of their petition for a writ of certiorari. To support the supplemental filing, Merican cites *Crimpers Promotions Inc. v. Home Box Office, Inc.*, 554 F. Supp. 838 (S.D.N.Y. 1982), *aff'd*, 5 Trade Reg. Rep. (CCH) ¶ 65,772 (2d Cir. 1983), *reprinted in* petitioners' Supplemental Brief Appendix at 1-18 (hereafter cited as "Supp. App. at ——").

Without a single citation to *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the district court in *Crimpers Promotions* on December 30, 1982, rejected the defendants' contention that the plaintiff in that case lacked standing.

554 F. Supp. at 847. On appeal, the Second Circuit was asked to decide,

> [W]hether a company organized to hold a trade show to facilitate contracts between producers of cable television programming and local cable television stations has standing to prosecute an action under § 4 of the Clayton Act against two companies which are alleged to dominate the business of purchasing and assembling programming from producers and selling it to the stations.

5 Trade Reg. Rep. at p. 67,173 (Supp. App. at 2.). The Second Circuit affirmed the district court, holding that the plaintiff did have standing.

Here, Caterpillar Tractor Co.'s motion for summary judgment, based upon the rule of *Illinois Brick*, did not contest Merican's standing. On the contrary, the issue presented to and decided by the Third Circuit, and now presented to this Court, expressly assumes that the Merican companies do have standing.

The question presented in this case is "analytically distinct" from the standing question addressed in *Crimpers Promotions*. 5 Trade Reg. Rep. at pp. 67,175-76 (Supp. App. at 9-10); *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 476 (1982); *Illinois Brick*, 431 U.S. at 728 n.7. This case presents the question whether the rule and principles of *Illinois Brick* bar the damages claims of these indirect-purchaser plaintiffs who are attempting to make offensive use of a passing-on theory of injury and damages. The Third Circuit properly determined, in accordance with this Court's decisions and those of all Courts of Appeals that have addressed the question, that *Illinois Brick* applies to bar plaintiffs' claims in these circumstances.

Crimpers Promotions has nothing to do with the issue of this case: in *Crimpers Promotions* there was no indirect purchaser, no allegedly illegal overcharge passed

through a chain of distribution, and thus no risk of duplicative recovery or overly complex, hypothetical damages theories that were found to be present in this case by the Third Circuit. *Crimpers Promotions* correctly applied this Court's standing law to the facts of that case. It is, however, simply not relevant to the analytically distinct question presented by Merican's petition. Neither the facts nor the holding in *Crimpers Promotions* in any way conflicts with the Third Circuit's decision in this case.

CONCLUSION

There is no conflict among the Courts of Appeals on the issue presented in plaintiffs' petition, and, as demonstrated in Caterpillar's Brief in Opposition, plaintiffs have shown no other reason warranting a grant certiorari. The petition should be denied.

Respectfully submitted,

DAVID C. MURCHISON
JOHN DEQ. BRIGGS, III
(Counsel of Record)
WILLIAM E. WALLACE, III
ALBERT C. LOEBE
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 783-0800
Attorneys for Respondent
Caterpillar Tractor Co.

February 15, 1984

Office - Supreme Court, U.S.
FILED
DEC 12 1983
ALEXANDER L. STEVAS,
CLERK

No. 83 - 914

SUPREME COURT OF THE UNITED STATES

October Term, 1983

MERICAN, INC.; MERICAN CURTIS, INC.; AND MERICAN CURTIS, LTD.,

Petitioners,

vs.

CATERPILLAR TRACTOR CO.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Third Circuit

BRIEF OF THIRTY-EIGHT STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

JOHN K. VAN DE KAMP
Attorney General
ANDREA SHERIDAN ORDIN
Chief Assistant Attorney General
SANFORD N. GRUSKIN
Assistant Attorney General
MICHAEL I. SPIEGEL
WAYNE M. LIAO*
Deputy Attorneys General
6000 State Building
San Francisco, CA 94102
(415) 557-2848

Attorneys for the
State of California
On Behalf of Amici States

*(Counsel of Record)

Counsel for the
State of Alabama

CHARLES A. GRADDICK
Attorney General
RICHARD L. OWENS
Assistant Attorney General
Antitrust Section
250 Administrative Building
64 N. Union Street
Montgomery, Alabama 36130
(205) 834-5150

Counsel for the
State of Alaska

NORMAN C. GORSUCH
Attorney General
CONNIE J. SIPE
Assistant Attorney General
1031 W. 4th Avenue, Suite 110
Anchorage, Alaska 99501
(907) 279-0428

Counsel for the
State of Arizona

ROBERT K. CORBIN
Attorney General
ALLISON B. SWAN
Assistant Attorney General
Chief Counsel, Antitrust Division
1275 West Washington
Phoenix, Arizona 85007
(602) 255-4751

Counsel for the
State of Arkansas

JOHN STEVEN CLARK
Attorney General
JEFFREY A. BELL
Assistant Attorney General
Litigation Division
Office of the Attorney General
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007

Counsel for the
State of Colorado

DUANE WOODARD
Attorney General
THOMAS P. McMAHON
First Assistant Attorney General
Chief, Antitrust Unit
1525 Sherman Street, Third Floor
Denver, Colorado 80203
(303) 866-3611

Counsel for the
State of Connecticut

JOSEPH I. LIEBERMAN
Attorney General
ROBERT M. LANGER
Assistant Attorney General
Chief, Antitrust/Consumer
Protection Unit
Office of the Attorney General
30 Trinity Street
Hartford, Connecticut 06106
(203) 566-5374

Counsel for the
State of Delaware

CHARLES M. OBERLY, III
Attorney General
VINCENT M. AMBERLY
Deputy Attorney General
820 N. French Street
Wilmington, Delaware 19801
(302) 571-2528

Counsel for the
State of Florida

JIM SMITH
Attorney General
BILL L. BRYANT, JR.
Deputy Attorney General
DAVID K. MILLER
Chief Counsel
Economic Crimes Division
LARRY H. EVANS
Chief, Antitrust Section
Florida Department of Legal Affairs
The Capitol
Tallahassee, Florida 32301
(904) 488-9105

Counsel for the
State of Georgia

MICHAEL J. BOWERS
Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
(404) 656-7273

Counsel for the
State of Idaho

JIM JONES
Attorney General of Idaho
LARRY K. HARVEY
Chief Deputy Attorney General
Office of the Attorney General
Boise, Idaho 83720
(208) 334-2400

Counsel for the
State of Illinois

NEIL F. HARTIGAN
Attorney General
ROBERT E. DAVY
Assistant Attorney General
Acting Chief, Antitrust Division
188 W. Randolph Street, Suite 2118
Chicago, Illinois 60601
(312) 593-2582

Counsel for the
State of Indiana

LINLEY E. PEARSON
Attorney General of Indiana
FRANK A. BALDWIN
Deputy Attorney General
219 Statehouse
Indianapolis, Indiana 46204
(317) 232-6210

Counsel for the
State of Iowa

THOMAS J. MILLER
Attorney General
JOHN R. PERKINS
Assistant Attorney General
Hoover State Building, Second Floor
Des Moines, Iowa 50319
(515) 281-3110

Counsel for the
State of Kansas

ROBERT T. STEPHAN
Attorney General
WAYNE E. HUNDLEY
Deputy Attorney General
Antitrust Division
Second Floor, Kansas Judicial Center
Topeka, Kansas 66612

Counsel for the
Commonwealth of Kentucky

STEVEN L. BESHEAR
Attorney General
JAMES M. RINGO
Assistant Attorney General
Antitrust Division
909 Leawood Drive
Frankfort, Kentucky 40601
(502) 564-2348

Counsel for the
State of Louisiana

WILLIAM J. GUSTE, JR.
Attorney General
JOHN R. FLOWERS, JR.
Assistant Attorney General
Chief, Antitrust Section
234 Loyola Building, Seventh Floor
New Orleans, Louisiana 70112
(504) 568-5565

Counsel for the
State of Maine

JAMES E. TIERNEY
Attorney General
STEPHEN L. WESSLER
Assistant Attorney General
Chief, Consumer and Antitrust
Division
State House
Augusta, Maine 04333
(207) 289-3717

Counsel for the
State of Maryland

STEPHEN H. SACKS
Attorney General
CHARLES O. MONK, II
Assistant Attorney General
Chief, Antitrust Division
MICHAEL F. BROCKMEYER
Assistant Attorney General
Munsey Building
Seven N. Calvert Street, Third Floor
Baltimore, Maryland 21202
(301) 576-6476

Counsel for the
Commonwealth of Massachusetts

FRANCIS X. BELLOTTI
Attorney General
ALAN L. KOVACS
Assistant Attorney General
Chief, Antitrust Division
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-5575

Counsel for the
State of Michigan

FRANK J. KELLEY
Attorney General
EDWIN M. BLADEN
Assistant Attorney General
Economic Crime Division
Office of the Attorney General
Lansing, Michigan 48913
(517) 373-3800

Counsel for the
State of Minnesota

HUBERT H. HUMPHREY, III
Attorney General
STEPHEN P. KILGRIFF
Assistant Attorney General
Chief, Antitrust Division
Second Floor, Ford Building
117 University Avenue
St. Paul, Minnesota 55155
(612) 296-2619

Counsel for the
State of Mississippi

BILL ALLAIN
Attorney General
ROBERT E. SANDERS
Special Assistant Attorney General
P.O. Box 220
Jackson, Mississippi 39205
(601) 961-4244

Counsel for the
State of Montana

MIKE GREELY
Attorney General
JOE R. ROBERTS
Assistant Attorney General
Office of the Attorney General
Justice Building
215 N. Sanders
Helena, Montana 59620
(406) 449-2026

Counsel for the
State of Nebraska

PAUL L. DOUGLAS
Attorney General
DALE A. COMER
Assistant Attorney General
Antitrust Division
2115 State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

Counsel for the
State of Nevada

BRIAN McKAY
Attorney General
WILLIAM E. ISAEFF
Chief Deputy Attorney General
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89710
(702) 885-4170

Counsel for the
State of New Mexico

PAUL BARDACKE
Attorney General
P.O. Drawer 1508
Santa Fe, New Mexico 87501
(505) 826-6000

Counsel for the
State of New York

ROBERT ABRAMS
Attorney General
LLOYD CONSTANTINE
Assistant Attorney General
Chief, Antitrust Bureau
RICHARD GABRIELE
Assistant Attorney General
Deputy Chief, Antitrust Bureau
Room 4579
Two World Trade Center
New York, New York 10047
(212) 488-7574

Counsel for the
State of North Carolina

H. A. COLE, JR.
Special Deputy Attorney General
Chief, Antitrust Division
FRED R. GAMIN
Assistant Attorney General
North Carolina Department of
Justice
P.O. Box 629
Raleigh, North Carolina 27602
(919) 733-3786

Counsel for the
State of Ohio

ANTHONY J. CELEBREZZE, JR.
Attorney General
KENNETH JAMES
Assistant Attorney General
Chief, Antitrust Section
30 East Broad Street
Columbus, Ohio 43215
(614) 466-2677

Counsel for the
Commonwealth of Pennsylvania

LEROY S. ZIMMERMAN
Attorney General
PAUL E. WATERS
Executive Deputy Attorney General
EUGENE F. WAYE
Deputy Attorney General
Chief, Antitrust Section
1435 Strawberry Square
Harrisburg, Pennsylvania 17120
(717) 787-4530

Counsel for the
State of Rhode Island

DENNIS J. ROBERTS
Attorney General
FAITH LASALLE
Special Assistant Attorney General
72 Pine Street
Providence, Rhode Island 02904
(401) 274-4400

Counsel for the
State of South Carolina

T. TRAVIS MEDLOCK
Attorney General
JAMES M. HOLLY
Executive Assistant for
Administration
JOHN P. WILSON
Deputy Attorney General
FRANK L. VALENTA, JR.
Assistant Attorney General
Rembert C. Dennis Building
Post Office Box 11549
Columbia, South Carolina 29211
(803) 758-2072

Counsel for the
State of South Dakota

MARK V. MEIERHENRY
Attorney General
JEFFRE P. HALLEM
Assistant Attorney General
State Capitol
Pierre, South Dakota 57501
(605) 773-3215

Counsel for the
State of Tennessee

WILLIAM M. LEECH, JR.
Attorney General and Reporter
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-2672

Counsel for the
State of Utah

DAVID L. WILKINSON
Attorney General
STEPHEN G. SCHWENDIMAN
Assistant Attorney General
Chief, Tax and Business Regulation Div.
SUZANNE M. DALLIMORE
Assistant Attorney General
Tax and Business Regulation Div.
236 State Capitol
Salt Lake City, Utah 84114
(801) 533-5261

Counsel for the
State of Vermont

JOHN J. EASTON, JR.
Attorney General
109 State Street
Montpelier, Vermont 05602
(802) 828-3171

Counsel for the
State of Washington

KEN EIKENBERRY
Attorney General
JOHN R. ELLIS
Deputy Attorney General
JON P. FERGUSON
Assistant Attorney General
1366 Dexter Horton Building
Seattle, Washington 98104
(206) 464-7744

TABLE OF CONTENTS

	PAGES
Table of Contents	i
Table of Authorities	iii
I. INTEREST OF AMICI STATES	1
A. IDENTITY OF AMICI STATES	1
B. AMICI States' INTEREST IN THIS CASE	2
SUMMARY OF ARGUMENT	3
II. THE COURT SHOULD EXERCISE ITS CERTIORARI JURISDICTION TO CORRECT THE THIRD CIRCUIT'S GREVIOUS MISAPPLICATION OF ILLINOIS BRICK	4
A. THE THIRD CIRCUIT ERRED IN CONCLUDING THAT PLAINTIFFS' CLAIMS INVOLVE PROOF SO COMPLEX THAT PLAINTIFFS' INJURIES CANNOT BE VINDICATED UNDER THE CLAYTON ACT	4
1. The Decision Below.	4
2. As the Direct Targets of Defendant's Discriminatory Pricing System, Plaintiffs Have Standing to Challenge Defendant's Conduct as Anticompetitive.	6

TABLE OF CONTENTS (cont.)

PAGES

3. There is Nothing in This Case That Portends Duplicate Recovery, Nor Is the Economic Theory of This Case So Complex That It Falls Within the Purview of Illinois Brick. 9

a. The Threat of Duplicate Recovery Here Is Non-existent. 10

b. Because the Dealers Sustained Separate Injuries, Proving Damages Does Not Involve Complex Economic Theories. 12

B. CERTIORARI WILL AFFORD THE COURT AN OPPORTUNITY TO EVALUATE WHETHER ILLINOIS BRICK IS BEING INTERPRETED IN ACCORDANCE WITH THIS COURT'S ANTITRUST JURISPRUDENCE 14

CONCLUSION 17

TABLE OF AUTHORITIES

CASES	PAGES
Albrecht v. Herald Co. (1968) 390 U.S. 145	18
Associated General Contractors v. California State Council of Carpenters (1983) __ U.S. __, 74 L.Ed.2d 723	passim
Bigelow v. RKO Radio Pictures (1946) 327 U.S. 250	12, 13
Blue Shield of Virginia v. McCready (1982) 457 U.S. 465	passim
Brunswick v. Pueblo Bowl-O-Mat, Inc. (1977) 429 U.S. 477	16
Continental T.V., Inc. v. GTE Sylvania, Inc. (1977) 433 U.S. 36	17
Grams v. Boss (Wisc. 1980) 97 Wisc.2d 332, 294 N.W.2d 473	2
Illinois Brick Co. v. Illinois (1977) 431 U.S. 720	passim
In re Petroleum Products (9th Cir. 1982) 691 F.2d 1335	14, 17
Independence Tube Corp. v. Copperweld Corp. (7th Cir 1983) 691 F.2d 310, cert. granted on other grounds, Supreme Court No. 81-1260	9
J. Truett Payne Co. v. Chrysler Motors Corp. (1981) 451 U.S. 557	13, 14

TABLE OF AUTHORITIES (cont.)

CASES	PAGES
Jones v. Ford Motor Co. (10th Cir. 1979) 599 F.2d 394	15, 17
Marin County Bd. of Realtors v. Palsson (Calif. 1976) 130 Cal.Rptr. 1, 549 P.2d 833	2
Merican Inc. et al. v. Caterpillar Tractor Co. (3d Cir. 1983) 713 F.2d 958	passim
National Broiler Marketing Assn. v. U.S. (1978) 436 U.S. 816	18
Neyens v. Roth (Iowa 1982) 326 N.W.2d 294	2
Parks v. Watson (9th Cir. 1983) 716 F.2d 646	9
People v. North Avenue Furniture & Appliance (Colo. 1982) 645 P.2d 1291	2
Perma Life Mufflers, Inc. v. International Parts Corp. (1968) 392 U.S. 134	18
Pittsburg Plate Glass Co. v. Paine & Nixon Co. (Minn. 1931) 234 N.W. 453	2
Rangen v. Sterling Nelson & Sons, Inc. (9th Cir. 1965) 351 F.2d 851, Cert. den. (1966) 383 U.S. 936	12
Reiter v. Sonotone Corp. (1979) 442 U.S. 330	16

TABLE OF AUTHORITIES (cont.)

CASES	PAGES
State v. Readers Digest Assoc. (1972) 81 Wn.2d 259, 501 P.2d 290	2
Stein v. United Artists Corp. (9th Cir. 1982) 691 F.2d 885	15, 17
Story Parchment Co. v. Paterson Co. (1930) 282 U.S. 555	13
United States v. American Cyanamid Co. (2d Cir. 1983) __ F.2d __, 1982-83 Trade Cases ¶ 65,656 at p. 69,299-65	16
Zenith Radio Corp. v. Hazeltine Research Inc. (1969) 395 U.S. 100	12
STATUTES	
15 U.S.C. § 16	7
15 U.S.C. § 16c	2
Clayton Act	passim
§ 4	16
§ 7	16
Supreme Court Rules	
Rule 36	1
Rule 17.1(a)	9
Rule 17.1(c)	18
MISCELLANEOUS	
Maness, State Antitrust Enforcement: Its Evolution and Future Direction, 27 Antitrust Bulletin 821 (1983)	3

I.

INTEREST OF AMICI STATES

The States of California, Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, and the Commonwealths of Kentucky, Massachusetts and Pennsylvania submit this brief pursuant to Supreme Court Rule 36 in support of Petitioners Merican, Inc., et al., plaintiffs in the proceedings below.

A. IDENTITY OF AMICI STATES

The Attorneys General of the Amici States are the chief law enforcement officers of their respective states. As such, they have legal responsibility for enforcing their respective states' antitrust laws.1/ In addition, the Attorneys General represent their respective states and political subdivisions in treble-damage actions under the federal

---

1/ Georgia does not have a state antitrust law. It does, however, play a major role in the enforcement of the federal antitrust laws.

antitrust laws, and are authorized by law to bring such actions as parens patriae on behalf of their natural citizens.2/

B. AMICI STATES' INTEREST IN THIS CASE

Because of their major role in the enforcement of federal antitrust laws, the Amici States have a substantial interest in the application of those laws in a manner consistent with the underlying Congressional policy and with this Court's antitrust jurisprudence. Moreover, the states' antitrust laws are often construed in accordance with federal court decisions interpreting corresponding provisions of the federal laws.3/

State governments are substantial consumers in the national economy. The value of state purchases annually exceeds $1 billion. In many instances, the states are indirect purchasers, particularly in major construction projects. The 1977 Illinois Brick, infra, decision has impaired the Amici States' efforts to

---

2/ 15 U.S.C. § 16c

3/ See, e.g., People v. North Avenue Furniture & Appliance (Colo. 1982) 645 P.2d 1291; Neyens v. Roth (Iowa 1982) 326 N.W.2d 294; Grams v. Boss (Wisc. 1980) 97 Wisc.2d 332, 294 N.W.2d 473; Marin County Bd. of Realtors v. Palsson (Calif. 1976) 130 Cal.Rptr. 1, 549 P.2d 833; State v. Readers Digest Assoc. (1972) 81 Wn.2d 259, 501 P.2d 290; Pittsburg Plate Glass Co. v. Paine & Nixon Co. (Minn. 1931) 234 N.W. 453.

enforce the antitrust laws to recover overcharges that have been paid from the states' treasuries, ultimately at the taxpaying public's expense. See, Maness, State Antitrust Enforcement: Its Evolution and Future Direction, 27 Antitrust Bulletin 821, 848 (1983).

The Amici States believe that the Third Circuit's decision on review here does not promote vigorous and effective antitrust enforcement. The decision undermines the antitrust enforcement policy implicit in the Court's recent McCready, infra, and Associated General, infra, opinions, and if allowed to stand, will be another step in permanently curtailing the ability of the Amici States' Attorneys General to protect and promote competition under the charter of the antitrust laws.

SUMMARY OF ARGUMENT

This Court should grant plaintiffs' petition for a writ of certiorari to decide: 1) whether the lack of privity between antitrust parties may in itself deny a Clayton Act remedy to direct victims of anticompetitive conduct; 2) whether Illinois Brick applies to allegations other than where a single overcharge is passed-on through a distribution chain; and 3) whether the proof of damages flowing from a boycott enforced by imposing a discriminatory price penalty is impermissibly complex.

In the Amici States' view, this Court's McCready and Associated General decisions confer

standing on plaintiffs here, irrespective of their non-privity with defendant. Pp. 4-9, infra. The indirect purchaser rule of Illinois Brick promotes antitrust enforcement only when strictly confined to pass-on situations. Pp. 6-11, infra. Finally, Illinois Brick did not create a separate "complexity test" for all antitrust allegations, pp. 9-14, infra, and the lower courts' approval of "bootstrap complexity" defenses that have emerged since Illinois Brick has impaired the effectiveness of private antitrust enforcement. Pp. 14-18, infra.

II

THE COURT SHOULD EXERCISE ITS CERTIORARI JURISDICTION TO CORRECT THE THIRD CIRCUIT'S GRIEVOUS MISAPPLICATION OF ILLINOIS BRICK

A. THE THIRD CIRCUIT ERRED IN CONCLUDING THAT PLAINTIFFS' CLAIMS INVOLVE PROOF SO COMPLEX THAT PLAINTIFFS' INJURIES CANNOT BE VINDICATED UNDER THE CLAYTON ACT

1. The Decision Below.

The court below transformed Illinois Brick[4/] from guidance about the role of economic proof where defendants' conspiratorial overcharges are allegedly passed-on through a multi-tiered distribution chain to plaintiff, into a doctrine of standing requiring

---

4/ Illinois Brick Co. v. Illinois (1977) 431 U.S. 720.

privity between antitrust plaintiffs and defendants. Merican Inc. et al. v. Caterpillar Tractor Co. (3d Cir. 1983) 713 F.2d 958. The court reached this result by first characterizing plaintiffs as indirect purchasers, who as nonfactory-authorized dealers acquired electrical generators for resale overseas from OMCO, an authorized domestic dealer. 713 F.2d at 967. Then the court held that the district court erred when it did not consider whether the Illinois Brick concerns of avoiding duplicate recovery and complex economic proceedings deprive plaintiffs of standing. 713 F.2d at 966.

Plaintiffs purchased generators at less than the list resale price, but did not receive the full 25% discount from list price that Caterpillar allowed its authorized dealers. 713 F.2d at 960. Plaintiffs provided all warranty services in conjunction with reselling the generators overseas, presumably at less than the list resale price to end-users. Caterpillar calculated the cost of services to be 5% of the list resale price and required its dealers to return that amount if they sold outside their authorized territories. The service fee would then be paid to the dealer who actually claimed to have performed warranty service. If no service was required during the warranty period, Caterpillar returned the 5% assessment to the dealer who made the extra-territorial sale. 713 F.2d at 960.

Allegedly at the behest of an authorized dealer who competed with plaintiffs in Saudi Arabia, Caterpillar discontinued reimbursing the servicing dealers while still retaining the 5% penalty for sales outside a dealer's territory. The result was that OMCO could not sell to plaintiffs at as much of a discount as it once did. 713 F.2d at 961.

In effect Caterpillar enforced a boycott against plaintiffs by imposing a discriminatory wholesale price penalty on OMCO. The court rejected plaintiffs' claim that the new service fee policy evidenced a conspiracy between Caterpillar and its Saudi dealer to raise plaintiffs' costs, and to allocate customers and territories thus eliminating plaintiffs as a source of resale competition. Instead, the court mistakenly adopted Caterpillar's contention that the new unrefundable service fee penalty collected on extra-territorial sales was a passed-on overcharge that rendered plaintiffs "indirect" victims of an overcharge to OMCO. 713 F.2d at 963.

2. As the Direct Targets of Defendant's Discriminatory Pricing System, Plaintiffs Have Standing to Challenge Defendant's Conduct as Anticompetitive.

The Amici States submit that the court below mistakenly treated the non-privity between the parties as automatically transforming Illinois Brick's concerns over avoiding double recovery and economic complexity

into a rule of standing — which it is not. Illinois Brick, supra, 431 U.S. at 728 n.7. In Blue Shield of Virginia v. McCready (1982) 457 U.S. 465, 475 n.11, this Court suggested that Illinois Brick best serves the antitrust laws' remedial purposes when confined to its facts. Because the difficulty of ascertaining damages should not be confused with the right of recovery, the Clayton Act, 15 U.S.C. § 16, "plainly focuses on tangible economic injury." 457 U.S. at 475 n.11. The lower court disregarded this standard by adopting a rigid analogy to Illinois Brick, concentrating on the superficial indirect relationship between the parties. Consequently, before Illinois Brick becomes a permanent barrier that all antitrust plaintiffs must hurdle, this Court should address whether the court below correctly held that Illinois Brick applies beyond horizontal price-fixing occuring at the upper level in a multi-tiered distribution chain. Caterpillar, supra, 713 F.2d at 967.

The lower court's willingness to expand Illinois Brick beyond pass-on situations to preclude the admitted victims of Caterpillar's conduct from recovering[5/] conflicts with this Court's opinion in Associated General Contractors v. California State

---

5/ "For purposes of this appeal, Caterpillar has conceded that Appellees would have standing if their claims are not barred by Illinois Brick." Caterpillar, supra, 713 F.2d at 966 n.19.

Council of Carpenters (1983) __ U.S. __, 74 L.Ed.2d 723. In that case, the Court held that the Clayton Act affords the right of recovery to those consumers or competitors who participate "in the market in which trade was restrained." 74 L.Ed.2d at 738. Here, the admitted victims of defendant's discriminatory service penalty competed with defendant's authorized dealers for sales to users of electrical generators. They are hardly too remote from defendant to be accorded standing.

If defendant's service penalty harmed anyone it was plaintiffs. While Caterpillar collected the 5% service fee to compensate authorized dealers who provided warranty service on generators sold outside another dealer's territory, plaintiffs' supplier OMCO was able to reduce its price to plaintiff, knowing that Caterpillar would return the 5% assessment because plaintiff provided all services and thus no authorized dealer would seek reimbursement. However, when Caterpillar stopped returning unclaimed service fees as a matter of policy, OMCO lost its previous ability to reduce its prices to plaintiffs. With OMCO now unable to offer plaintiffs as great a discount as before, Caterpillar had curtailed plaintiffs' competitiveness against its Saudi dealer.

The lower court therefore erred twice under Associated General: first, by refusing to accept plaintiffs' allegations as true, 74 L.Ed.2d at 730, and

second, by denying plaintiffs standing as the direct target of defendant's anticompetitive conduct. 74 L.Ed.2d at 738.6/

3. There is Nothing in This Case That Portends Duplicate Recovery, Nor Is the Economic Theory of This Case So Complex That It Falls Within the Purview of Illinois Brick.

In Illinois Brick this Court fashioned a rule of judicial administration intended to streamline litigation and to promote antitrust enforcement. That rule prefers direct purchasers to vindicate the Clayton Act where a single conspiratorial overcharge may make its way through a distribution chain to other sellers and the end-users.

In Illinois Brick the trial court confronted the task of deciding how to avoid duplicate recovery where a single overcharge was to be allocated among several

---

6/ The Caterpillar result would probably not have been reached in the Seventh Circuit. Independence Tube Corp. v. Copperweld Corp. (7th Cir. 1983) 691 F.2d 310, cert. granted on other grounds, Supreme Court No. 82-1260. There, the court had no difficulty approving plaintiff's standing to challenge the lawfulness of a boycott imposed when defendants induced a third party to void an agreement to supply a tubing mill to plaintiff. Moreover, making certiorari here all the more appropriate, Supreme Court Rule 17.1(a), is the disparity between the Third Circuit's Caterpillar standing analysis and a recent Ninth Circuit analysis under Associated General, supra. Parks v. Watson (9th Cir. 1983) 716 F.2d 646, 658.

classes of purchasers where separate markets intervened between the claimants. To assure enforcement on these facts, the Illinois Brick Court chose to allow direct purchasers full recovery instead of approving protracted economic proof of tracing and apportionment among all purchasers. Illinois Brick, supra, 431 U.S. at 745.

The Court held that the presence of intermediaries posed a threat of duplicate recovery, and that the economic proceedings required to apportion among direct and indirect purchasers damages flowing from a manufacturers' conspiratorial overcharge were so complex that they impaired treble damages actions. Illinois Brick, supra, 431 U.S. at 730 and 745. Nowhere did the Court hold that complexity alone had become an acceptable pleading defense in all antitrust cases. Nowhere did the Court require that economic proof in all antitrust cases be made with arithmetic exactitude.

a. The Threat of Duplicate Recovery Here Is Non-existent.

In spite of Illinois Brick's closely drawn holding, the court below decided that plaintiffs' non-privity with defendant was in itself sufficient to raise the possibility of duplicate recovery and render proof of damages from Caterpillar's new service fee penalty impermissibly complicated. Caterpillar, supra, 713 F.2d at 969. The lower court reached this conclusion outside a pass-on situation, postulating that

OMCO, the authorized dealer from whom plaintiffs purchased, might sue on the same Caterpillar transactions. 713 F.2d at 969.

The lower court's error lies in its assumption that OMCO and plaintiffs would suffer the same damage. Although defendant's conspiratorial act of retaining the 5% service fee as a penalty to enforce a boycott may have harmed both plaintiffs and OMCO, there is no passing-on here because the penalty did not raise OMCO's wholesale price. Caterpillar's conspiratorial penalty simply raised plaintiffs' costs so high that they were driven into unprofitability. OMCO lost its profitable business with plaintiffs.

This case, then, involves two damage claims that do not overlap: 1) plaintiffs' lost profits on the sales it would have made but for defendant's boycott; and 2) OMCO's separate lost profits on sales that were not made to plaintiffs after Caterpillar began enforcing the boycott. Each set of lost profits was an independent function of Caterpillar conspiratorially ending its policy of refunding the 5% service fee set-aside when no dealer claimed it.

The offending fixed rate service fee penalty was not a passed-on overcharge, and was, therefore, not subjected to the same uncertainties of intervening market forces between plaintiffs and Caterpillar as the manufacturers' conspiratorial overcharge was in Illinois Brick. Consequently, the possibility of multiple claims against a single overcharge that troubled this Court in Illinois Brick is not present in this case.

b. Because the Dealers Sustained Separate Injuries, Proving Damages Does Not Involve Complex Economic Theories

As demonstrated above, each set of lost profits is a separate injury. They are not components of a single overcharge subject to multiple suits, but instead derive from one act that worked two distinct injuries.

Calculating plaintiffs' damages is simple: the trier of fact need only compare plaintiffs' profitability on its resales of Caterpillar generators before and after the boycott began.7/ If OMCO were to sue its supplier Caterpillar, its separate damages would be similarly easy to ascertain: OMCO's damages would be its lost profits on sales to plaintiffs based on its historic profitability.8/

Neither set of lost profits is difficult to measure compared to the Illinois Brick challenge of tracing and allocating a brick manufacturers' overcharge passed down the distribution chain to masonry contractors, general contractors, and governmental purchasers who dealt in separate markets.

7/ This comparison is the standard method for determining damages from market exclusion offenses. Zenith Radio Corp. v. Hazeltine Research, Inc. (1969) 395 U.S. 100, 123; Rangen v. Sterling Nelson & Sons., Inc. (9th Cir. 1965) 351 F.2d 851, 856, Cert. den. (1966) 383 U.S. 936.

8/ See, Bigelow v. RKO Radio Pictures, Inc. (1946) 327 U.S. 251, 257.

Plaintiffs' lost sales and profits are the direct, intended result of defendant's conduct, and readily proved. See note 7 supra. OMCO's lost sales are not subject to demand elasticities because the boycott affected only plaintiffs and not OMCO's other customers. Therefore, the simple and well established method of calculating OMCO's damages as the loss of historic profitability on plaintiffs' accounts is not the kind of economic theory that Illinois Brick disapproved. Bigelow, supra.

Accordingly, the Caterpillar court's quibble whether plaintiffs' proposed proof of damages is precise enough, 713 F.2d at 969, turns a deaf ear to this Court's admonition that "[t]he wrongdoer is not entitled to complain that they [antitrust damages] cannot be measured with the exactness and precision that would be possible if the case which he alone is responsible for making, were otherwise." Story Parchment Co. v. Paterson Co. (1930) 282 U.S. 555, 563. Indeed, "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created," Bigelow, supra, 327 U.S. at 265, because "it does not 'come with very good grace' for the wrongdoer to insist upon specific and certain proof of injury which it has itself inflicted." J. Truett Payne Co. v. Chrysler Motors Corp. (1981) 451 U.S. 557, 566.

Consequently, this Court's

> "willingness to accept a degree of uncertainty in these cases rests in part on the difficulty of acertaining business damages as compared, for example, to damages resulting from a personal injury or from condemnation of parcel of land. The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation."
>
> J. Truett Payne, supra, 451 U.S. at 566.

That the lower court here considered the task of proving damages fraught with complications testifies to the defense bar's success in conceiving and advancing artificial economic complexities since the advent of Illinois Brick. Caterpillar, supra, 713 F.2d at 969.

B. CERTIORARI WILL AFFORD THE COURT AN OPPORTUNITY TO EVALUATE WHETHER ILLINOIS BRICK IS BEING INTERPRETED IN ACCORDANCE WITH THIS COURT'S ANTITRUST JURISPRUDENCE

Over the past six years the courts have allowed resourceful counsel to view Illinois Brick as an invitation to invent complexity arguments, and in turn have analogized a panoply of allegations to the indirect purchaser context of Illinois Brick. The result has not been good for antitrust enforcement. See, e.g., In re Petroleum Products (9th Cir. 1982) 691 F.2d 1335

(retail gasoline purchasers barred from claiming damages where oil companies conspired on retail prices but sold through captive intermediary dealers); Stein v. United Artists Corp. (9th Cir. 1982) 691 F.2d 885, 897 n.5 (boycott to force primary shareholder to sell defendants half of his stock at less than fair market value); Jones v. Ford Motor Co. (10th Cir. 1979) 599 F.2d 394 (manufacturer-controlled dealership terminated non-voting stockholder's management contract at the behest of another dealer who complained that plaintiff's advertising infringed his territory and who eventually bought the terminated dealership from the manufacturer.)

These lower court decisions are a disservice to the Court's long-standing interpretation of the Clayton Act: deterring violators, depriving them of the fruits of their illegalities, and compensating victims of antitrust violations for their injuries. See, Illinois Brick, supra, 431 U.S. at 746. The Caterpillar decision under consideration here is but one more, truly blatant, misapplication of Illinois Brick that inhibits enforcement. While the Illinois Brick Court dispensed with certain complex economic proof to favor direct purchasers as private attorneys general in one limited situation, the lower courts in Caterpillar and other cases have mistaken Illinois Brick for a blanket antitrust defense wherever complicated economics can be hinted.

The recent surge of defensive economic theories that always seem to be complex, Caterpillar, supra, 713 F.2d at 769, should not be allowed to upset the enforcement-promoting antitrust jurisprudence that this Court has announced for nearly a century. United States v. American Cyanamid Co. (2d Cir. 1983) __ F.2d __, 1982-83 Trade Cases ¶ 65,656 at p. 69,299-65 (Supreme Court case law, not currently fashionable economic theory, must govern determinations under Section 7 of the Clayton Act.) Should the Caterpillar decision stand, it will add to the weight of precedent where the courts have willy-nilly applied Illinois Brick to dismiss cases, frustrating this Court's recent efforts to interpret the Clayton Act in a manner providing a cohesive enforcement scheme. Associated General, supra; McCready, supra; Reiter v. Sonotone Corp. (1979) 442 U.S. 330; Brunswick v. Pueblo Bowl-O-Mat, Inc. (1977) 429 U.S. 477.

As shown above, the Caterpillar court placed itself in this predicament of undermining private enforcement through its slavishly literal Illinois Brick interpretation that any non-privity between antitrust parties compels it to entertain defendant's arguments on economic complexity. This rigid reading of Illinois Brick assures an outcome impairing private enforcement and denying substantial justice; it disregards McCready's teaching that Section 4 of the Clayton Act "plainly focuses on tangible economic injury," McCready, supra, 457 U.S. at 475 n.11, while

encouraging lawyers to reach the perverse zenith of their skill — creating, rather than cutting away, complexity.

If the Caterpillar court's real problem was resolving whether plaintiffs' injuries were too remote to confer standing, it should have performed its analysis entirely under Associated General, supra. That did not happen; the court instead chose to base its decision on Illinois Brick, thus allowing its wooden application of Illinois Brick to trap its analysis in the never-never land of economic complexity. Caterpillar, supra, 713 F.2d at 960. The Caterpillar court has thus created a dangerous self-fulfilling prophecy, forgetting that "[r]ealities must dominate the judgement .... The Anti-Trust Act aims at substance." Continental T.V., Inc. v. GTE Sylvania, Inc. (1977) 433 U.S. 36, 47.

CONCLUSION

So far, Illinois Brick has not been the boon to antitrust enforcement that the Court had hoped to create. Instead it has become the basis of a pleading defense that many courts indiscriminately allow. The Third Circuit has erred here and so have others (Petroleum Products, supra; Stein, supra; Jones, supra) in extending Illinois Brick beyond the pass-on circumstances where market forces actually intervene between parties, where the economic theory for tracing and allocating a single conspiratorial overcharge is

complex, and where the risk of double recovery is greater than mere speculation.

This case raises "an important question of federal law which has not been, but should be, settled by this Court," Supreme Court Rules, Rule 17.1(c), so that certiorari should be granted. Certiorari is appropriate where rulings below "threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States ...." Perma Life Mufflers, Inc. v. International Parts Corp. (1968) 392 U.S. 134, 136, and where the case presents important issues under the antitrust laws. Albrecht v. Herald Co. (1968) 390 U.S. 145, 146; National Broiler Marketing Assn. v. U.S. (1978) 436 U.S. 816, 818.

Respectfully submitted this 9th day of December, 1983.

JOHN K. VAN DE KAMP
Attorney General
ANDREA SHERIDAN ORDIN
Chief Assistant Attorney General
SANFORD N. GRUSKIN
Assistant Attorney General
MICHAEL I. SPIEGEL
WAYNE M. LIAO*
Deputy Attorneys General

Attorneys for the State of
California on behalf of
Amici States

*(Counsel of Record)